Supreme Court, U. S.
FILED
JUL 7 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-441

PAUL A. PEMBERTON,
Petitioner,

vs.

LAWRENCE SPERANDIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

EARL E. MCCLEAVE
JACK G. BEAMER
2100 Bryant Building
Kansas City, Missouri 64106
Telephone 842-0850
Attorneys for Petitioner

Ed L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

Opinions Below 1

Jurisdiction 2

Questions Presented 3

Constitutional and Statutory Provisions Involved 4

Statement of the Case 5

Reasons for Granting the Writ 10

Under the facts of this case the order of the Supreme Court of Missouri deprives the petitioner of Due Process of Law under the Fourteenth Amendment and the decisions of this Court 10

Conclusion 24

Appendix A—

Item 1. Opinion of the Supreme Court of Missouri A1

Item 2. Alternative Writ of Mandamus A6

Order Denying Petition for Alternative Writ of Mandamus As to Paul A. Pemberton, M.D. and Harry B. Overesch, M.D. A8

Item 3. Order of the Circuit Court of Missouri, Sixteenth Judicial Circuit A9

Item 4. Order of the Circuit Court of Jackson County, Missouri A10

Appendix B—

Item 1. Motion of Defendant Paul A. Pemberton, M.D. to Quash Process, to Quash Purported Service of Summons, and to Quash Purported Return on Summons, and to Discharge This Defendant From This Action A11

Item 2. Petition for Damages A18

Item 3. Separate Motion of Defendant Paul A. Pemberton to Quash Process and Return of Process and to Discharge This Defendant A27

Exhibit A. Affidavit A30

Exhibit B. Letter of September 14, 1967, to Paul Pemberton From Harvey R. Michael A34

Exhibit C. Letter of September 21, 1967, to Harvey R. Michael From Paul Pemberton A36

Item 4. Affidavit of John C. Milholland A39

Item 5. Suggestions in Opposition to Petition for Alternative Writ of Mandamus A44

Item 6. Order of Missouri Court of Appeals, Kansas City District A52

Item 7. Motion to Dismiss A53

Item 8. Alternative Writ of Mandamus A56

Appendix C—

Item 1. Order of the Supreme Court of Missouri (overruling Motion for Rehearing) A59

Item 2. Order of the Supreme Court of Missouri (sustaining motion for stay) A60

Table of Authorities

Cases

Aftanese v. *Economy Baler Co.*, 343 F. 2d 187 (8th Cir. 1965) 13, 14

Amba Marketing Systems, Inc. v. *Jobar International Inc.*, 551 F. 2d 784 (9th Cir. 1977) 12

Desert Palace Inc. v. *Silisbury*, 401 F. 2d 320 (7th Cir. 1968) 13

Fisher v. *The District Court of the Sixteenth Judicial District of Montana in and for County of Rosebud*, 424 U.S. 382, 96 S. Ct. 943 (1976) 2-3

Gelineau v. *New York University Hospital*, 375 F. Supp. 661 (D. N.J. 1974) 16, 21

Gray v. *American Radiator and Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E. 2d 761 (1961) 11, 24

Hanson v. *Denckla*, 357 U.S. 235, 78 S. Ct. 1228 (1958) 11, 13, 14, 16

Insull v. *New York World Telegram*, 273 F. 2d 166 (7th Cir. 1960) 13

International Shoe Co. v. *State of Washington*, 326 U.S. 310, 66 S. Ct. 154 (1945) 10, 11, 13, 24

Jones Enterprise Inc. v. *Atlas Service Corp.*, 442 F. 2d 1136 (9th Cir. 1971) 15, 18

Kulko v. *Superior Court of California*, ... U.S. ....., 98 S. Ct. 1690 (1978) 13, 16

Kulm v. *Idaho First National Bank*, 428 F. 2d 616 (8th Cir. 1970) 13

Litzinger v. *Pulitzer Publishing Co.*, 356 S.W. 2d 81 (Mo. 1962) 12

McAndrew v. *Burnett*, 374 F. Supp. 460 (M.D. Pa. 1974) 20

McGee v. *International Life Insurance Co.*, 355 U.S. 220, 78 S. Ct. 199 (1957) 13

McNutt v. *General Motors Acceptance Corp.*, 298 U.S. 178, 56 S. Ct. 780 (1936) 11-12

Shaffer v. *Heitner*, ... U.S. ....., 97 S. Ct. 2569 (1977) 13, 16, 17

State ex rel. Deere & Company v. *Pinnell*, 454 S.W. 2d 889 (Mo. 1970) 10-11

State of Missouri, ex rel. Bank of Gering v. *Schoenlaub*, 540 S.W. 2d 31 (Mo. 1976) 13

Taylor v. *Portland Paramount Corp.*, 383 F. 2d 634 (9th Cir. 1967) 10, 11, 12, 14
Trippe Mfg. Co. v. *Spencer Gifts Co., Inc.*, 270 F.2d 821 (7th Cir. 1959) 13
Vanderbilt v. *Vanderbilt*, 354 U.S. 416, 77 S. Ct. 1360 (1956) 11
Van Kleeck Creamery, Inc. v. *Western Frozen Products Co.*, 24 Utah 2d 63, 465 P. 2d 544 (1970) 11
Wright v. *Yackley*, 459 F. 2d 287 (9th Cir. 1972) 14, 17

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States, Fourteenth Amendment 3, 4, 11
Missouri Revised Statutes, 1969, § 506.500 ..... 4, 10
28 U.S. Code § 1257(3) 3

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. .....

PAUL A. PEMBERTON,
Petitioner,

vs.

LAWRENCE SPERANDIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Paul A. Pemberton, the petitioner herein and the real party in interest in the proceeding below, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Missouri entered in the case of *State ex rel. Lawrence Sperandio* v. *The Honorable Lewis W. Clymer*, Judge, 16th Judicial Circuit on the 10th day of April, 1978.

OPINIONS BELOW

The Opinion of the Supreme Court of Missouri en banc, dated April 10th, 1978 is not reported and is included herein as Appendix A, page A1. The order of the Supreme Court of Missouri en banc overruling respondent's motion for rehearing, dated April 28, 1978 is unreported and is included herein as Appendix C, page A59. The opinion of the Missouri Court of Appeals, Kansas City District, dated June 23, 1977 is not reported and is included herein as Appendix A, page A6.

The order of the Circuit Court of Jackson County, Missouri, dated September 19, 1977 is unreported and is included herein as Appendix A, page A10. The order of the Circuit Court of Jackson County, Missouri dated March 7, 1975 is unreported and is included herein as Appendix A, page A9.

JURISDICTION

This appeal arises from a Mandamus action filed by the State of Missouri at the relation of Lawrence Sperandio to compel respondent, Lewis W. Clymer, Judge of the Circuit Court of Jackson County, Missouri, to set aside the dismissal entered by him against Paul A. Pemberton and to exercise jurisdiction over the person of the said Paul A. Pemberton in cause No. CV 75-0031 entitled Lawrence Sperandio v. Harvey R. Michael, M.D. et al. The judgment of the Supreme Court of Missouri, en banc, was entered on April 10, 1978 and a rehearing denied on April 28, 1978. The only issue determined in this proceeding for Mandamus was the jurisdiction of the trial court and the judgment is final. *Fisher* v. *The District Court of the Sixteenth Judicial District of Montana in and*

for County of Rosebud, 424 U.S. 382, 96 S. Ct. 943 (1976). The jurisdiction of this Court is invoked under provisions of Title 28 U.S. Code § 1257, sub-paragraph (3).

QUESTIONS PRESENTED

Whether or not the Due Process Clause of the 14th Amendment of the Constitution of the United States precludes the exercise of *in personam* jurisdiction by the courts of Missouri over the petitioner, Dr. Paul A. Pemberton, a resident of the State of Utah who was served with process within the State of Utah and whose only contact with the State of Missouri is that he gratuitously responded to a letter from respondent Lawrence Sperandio's personal physician, Dr. Harvey P. Michael, a Missouri resident, explaining a surgical procedure developed by Pemberton and how it might be applied to Dr. Michael's patient.

(a) Whether or not the plaintiff below satisfied his burden of proof as to jurisdiction where plaintiff's allegations were contradicted by affidavit and no counter affidavit in point was filed and no evidence produced.

(b) Whether or not the gratuitous furnishing of information by Dr. Pemberton to Dr. Michael created a doctor-patient or any other special relationship between Dr. Pemberton and Sperandio which gave rise to a duty to Sperandio on the part of Dr. Pemberton to exercise ordinary care.

(c) Whether or not the gratuitous furnishing of information by Dr. Pemberton to Dr. Michael, followed by an operation on plaintiff below in Missouri by Dr. Michael which plaintiff alleges was negligently performed and caused him injury, constituted the commission of a tortious act by Dr. Pemberton within the State of Missouri.

(d) Whether or not Dr. Pemberton received or reasonably could be expected to receive any benefit or protection from the laws of Missouri.

(e) Whether or not traditional notions of fair play, reasonableness, and justice required Dr. Pemberton to appear in the State of Missouri to answer charges made against him by the plaintiff.

(f) Whether or not the quality and nature of professional and personal services require a different treatment from commercial transactions or products in the stream of commerce in determining what constitutes minimum contacts under the Due Process Clause.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the Constitution of the United States

> § 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without Due Process of Law; Nor deny to any person within its jurisdiction the equal protection of laws.

Missouri Revised Statutes, 1969, § 506.500

> Actions in which outstate service is authorized
>
> 1. Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated

> in this section, thereby submits such person, firm, or corporation, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any such acts:
>
> (1) The transaction of any business within this state;
>
> (2) The making of any contract within this state;
>
> (3) The commission of a tortious act within this state;
>
> (4) The ownership, use, or possession of any real estate situated in this state;
>
> (5) The contracting to insure any person, property or risk located within this state at the time of contracting.
>
> 2. Only causes of action arising from acts enumerated in this section may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

STATEMENT OF THE CASE

Respondent Lawrence Sperandio, a resident of Verona in Southwest Missouri, was afflicted with a congenital deformity of his hips with resulting subluxation of the femoral heads, which caused him pain as he grew older and engaged in farming operations which required him to be on his feet a great deal of time. On the advice of his family physician, Sperandio consulted with an orthopedic specialist in Springfield, Missouri, Dr. Harvey R. Michael. Dr. Michael during his orthopedic surgery residency at the University of Oklahoma Medical School be-

came aware of a treatment for plaintiff's condition, sometimes referred to as hip dysplasia, which had been developed by Dr. Paul A. Pemberton, an orthopedic surgeon in Salt Lake City, Utah. This was a surgical operation referred to as an iliac osteotomy or pericapsular osteotomy and sometimes as the Pemberton Procedure. It was primarily used on children but had been used successfully on young adults such as Sperandio.

On September 14, 1967 Dr. Michael wrote to Dr. Pemberton in Salt Lake City, identifying himself as a former medical student at the University of Oklahoma Medical School where he had heard Dr. Pemberton speak on congenital hip dislocations, and stating that he had a patient with such a condition, Lawrence C. Sperandio. Mr. Sperandio's history and clinical findings were stated and x-rays enclosed. Appendix B, page A34. The letter requested Pemberton's opinion as to the etiology of Sperandio's hip condition and the most satisfactory method of treatment—especially whether or not an osteotomy was indicated and if so how the procedure should be modified for an adult patient.

On September 21, 1967 Dr. Pemberton from his home in Salt Lake City, Utah, prepared and mailed a reply to Dr. Michael in Springfield, Missouri. Appendix B, page A36. In his letter Dr. Pemberton agreed with Dr. Michael's diagnosis of hip dysplasia; indicated that treatment of the condition in a man of Sperandio's age was a serious problem; stated that he, Pemberton, had by making certain modifications in the procedure he had developed for children, successfully performed the operation on adults. The procedure was described and illustrated by marks on Sperandio's x-rays. Dr. Pemberton indicated his interest in being advised of the outcome of such an operation on Sperandio if Dr. Michael undertook the task. In neither

Dr. Michael's letter nor Dr. Pemberton's reply was any mention made of any employment of Dr. Pemberton or any compensation to him for his advice. No further correspondence was exchanged between the two doctors and Dr. Pemberton did not hear anything further about the case until after suit was filed by Sperandio against the Missouri doctors. On December 22, 1967 Dr. Michael and Dr. Daniel L. Yancey operated on Sperandio's left hip in Springfield, Missouri. Sperandio was not satisfied with the result of the operation and filed suit against Drs. Michael, Yancy and Virgeen on November 28, 1969 in Greene County, Missouri. Dr. Pemberton was first named as a party defendant in this action by a first amended petition filed on July 8, 1974. Purported service of process was had on Dr. Pemberton in Salt Lake City by a deputy sheriff of Salt Lake County on July 31, 1974. Appearing specially, Dr. Pemberton moved to quash the process on the grounds, among others, that it was improperly issued by the Missouri Court which was without personal jurisdiction over Pemberton and the attempted service in Utah deprived him of Due Process of Law under the Fourteenth Amendment of the Constitution of the United States. Appendix B, page A11. Plaintiff made no response to the motion and before the court could rule, plaintiff dismissed without prejudice on October 22, 1974.

On January 3, 1975 plaintiff filed his petition for damages against Drs. Michael, Yancy, Pemberton and four other doctors in the Circuit Court of Jackson County, Missouri, No. CV 75-0031. Appendix B, page A18. Again service was attempted on Pemberton in Salt Lake City, Utah and again Dr. Pemberton moved to quash process because the Court was without jurisdiction and the attempted service deprived Pemberton of Due Process under the Fourteenth Amendment of the United States Constitu-

tion. Appendix B, page A27. The motion was accompanied by an affidavit of Dr. Pemberton which stated that his only residency in Missouri was in 1943-1944 when he was in Military Service; that since leaving the service he has been a resident of Salt Lake City, Utah; that he had at no time had any contact or dealings with Lawrence Sperandio; that his only contact with Dr. Michael was the September 14th letter, Appendix B, page A30, and the letter he wrote in reply, Appendix B, page A36; that he had heard nothing further about the case until plaintiff filed suit; that he had no contact with and did not know any of the other doctors named as defendants; that he had never practiced medicine or carried on any business in the State of Missouri; that he did not go to Missouri for any purpose; that his reply to Dr. Michael's letter was made without any promise or expectation of compensation. The suggestions filed in support of the motion clearly and fully asserted Pemberton's reliance upon the rights and immunities granted to him by the Fourteenth Amendment and cited the decision of the Supreme Court of the United States which were relied on.

Sperandio's suggestions in opposition were likewise addressed to the question of jurisdiction of the court and the validity of service of process upon Pemberton in Utah under the Due Process clause. Attached to the suggestions was the affidavit of plaintiff's attorney, John Milholland, which did not deny or dispute any of the statements of fact contained in Pemberton's affidavit. Appendix B, page A39. This failure of the plaintiff to make a prima facie case as to jurisdiction was pointed out in Pemberton's reply suggestions and on March 7, 1975 the trial court, Judge Bondurant, sustained Pemberton's motion to quash process and return of process and to discharge Pemberton. Appendix A, page A9.

Two years later in May 1977, plaintiff petitioned the Missouri Court of Appeals, Kansas City District, for a Writ of Mandamus to compel the trial court to set aside its order of dismissal as to Pemberton and proceed to exercise personal jurisdiction over him in the case. Pemberton filed his suggestions in opposition to the petition which again asserted his reliance upon the Fourteenth Amendment, Appendix B, page A44.

The Petition for an alternative Writ of Mandamus was denied by the Missouri Court of Appeals, Kansas City District on June 23, 1977. Appendix A, page A6. Plaintiff then filed his motion for an order amending the alternative Writ of Mandamus and suggestions in support and Pemberton filed suggestions in opposition. Again the question of jurisdiction under the Fourteenth Amendment was a central issue. On July 5, 1977 the motion was overruled. Appendix B, page A52.

On August 3, 1977 the plaintiff caused the petition as originally filed to be re-served upon Pemberton in Salt Lake City, Utah. Pemberton again filed his motion to dismiss and suggestions in support. Appendix B, page A53. Suggestions in opposition were filed by the plaintiff and reply suggestions filed by Pemberton. On September 19, 1977 the Circuit Court of Jackson County, Missouri, Lewis W. Clymer, Judge, ordered dismissal of the petition with prejudice against refiling in the State of Missouri. Appendix A, page A10.

On October 17, 1977 plaintiff filed his petition for an alternative Writ of Mandamus and on October 27, 1977 Pemberton filed suggestions in opposition. On November 14, 1977 the Supreme Court issued its alternative Writ, Appendix B, page A56. Respondent Judge filed his return to the alternative Writ and motion to quash. Printed briefs were filed with the Supreme Court and the case

was orally argued on January 25, 1978. On April 10, 1978 the Missouri Supreme Court en banc issued its opinion making the alternative Writ of Mandamus peremptory and odered the trial court to set aside the dismissal as to Pemberton and to proceed to exercise personal jurisdiction over him. Appendix A, page A1. Respondent Judge filed his motion for rehearing and suggestions in support and Sperandio filed counter suggestions. On April 28, 1978 the Supreme Court overruled the motion for rehearing. Appendix C, page A59, and on May 23, 1978 granted Respondent a stay of proceedings to permit a Petition for Writ of Certiorari to be filed in the United States Supreme Court. Appendix C, page A60.

REASONS FOR GRANTING THE WRIT

Under the facts of this case the order of the Supreme Court of Missouri deprives the petitioner of Due Process of Law under the Fourteenth Amendment and the decisions of this Court.

Foremost among many reasons why the Supreme Court of the United States should grant this Writ is the candidly admitted fact that the Supreme Court of Missouri, along with the Supreme Court of other states and some Circuit Courts of Appeal, have abdicated their responsibility under *International Shoe Co.* v. *State of Washington,* 326 U.S. 310, 66 S. Ct. 154 (1945) to construe state enacted Long Arm Statutes, such as Missouri Revised Statutes, 1969, Section 506.500, so as to consider and protect the interest of residents and non-residents equally and have adopted the rule that the forum court will exercise jurisdiction over non-resident defendants whenever this will benefit the local plaintiff. *Taylor* v. *Portland Paramount Corp.,* 383 F. 2d 634, 640 (9th Cir. 1967); *State ex rel.*

Deere & Company v. *Pinnell,* 454 S.W. 2d 889, 892 (Mo. 1970); *Gray* v. *American Radiator and Standard Sanitary Corp.,* 22 Ill. 2d 432, 176 N.E. 2d 761 (1961). Each new opinion seems to extend this principle further and unless the Supreme Court of the United States calls a halt to the practice the guarantee of Due Process contained in the Fourteenth Amendment, and the general guidelines laid down by this Court in *International Shoe, supra*; *Hanson* v. *Denckla,* 357 U.S. 235, 78 S. Ct. 1228 (1958); *Vanderbilt* v. *Vanderbilt,* 354 U.S. 416, 77 S. Ct. 1360 (1956) will be meaningless. If the opinion of the Supreme Court of Missouri herein is permitted to stand unchallenged it is difficult to conceive of a set of facts where a non-resident could not be summoned by mail addressed to his home—however remote from the forum—and required to defend himself at great expense, difficulty and inconvenience against charges—however frivolous and speculative—in some alien court applying local law that he never heard of, before a jury of hostile local citizens. The inevitable result of such Russian-like attempts to extend local authority will be additional litigation once the non-resident returns to his home state to determine whether or not his local courts will give full faith and credit to the foreign judgment. *Taylor* v. *Portland Paramount Corp. supra,* at p. 643; *Van Kleeck Creamery, Inc.* v. *Western Frozen Products Co.,* 24 Utah 2d 63, 465 P. 2d 544 (1970). This procedure is wasteful of the time and money of both the litigants and the courts alike and leaves the petitioner without any way of recouping his expenses or being compensated for the aggravation, harassment and strain caused by appearing for trial in a foreign jurisdiction.

Where the jurisdiction of the court is challenged, as it was here by motion to quash and affidavits in support, Appendix B, page A30, the party asserting the jurisdiction has the burden of establishing it. *McNutt* v. *General Mo-*

tors Acceptance Corp., 298 U.S. 178, 56 S. Ct. 780 (1936); *Taylor* v. *Portland Paramount Corp., supra* at page 639; *Amba Marketing Systems, Inc.* v. *Jobar International Inc.*, 551 F. 2d 784, 787 (9th Cir. 1977); *Litzinger* v. *Pulitzer Publishing Co.*, 356 S.W. 2d 81, 87 (Mo. 1962).

The mere allegation in plaintiff's petition that Pemberton committed a tort within the State of Missouri because he, Dr. Michael and Dr. Yancy acting jointly and for hire, operated on Sperandio in Missouri and injured him, when contradicted by Pemberton's affidavit, is not enough to confer personal jurisdiction over a non-resident. So the lower court found on two separate occasions and the Court of Appeals, Kansas City District agreed. Appendix B, page A52.

But now the Missouri Supreme Court in its opinion below, totally overlooking the fact that there was no doctor-patient relationship between Pemberton and Sperandio and that Dr. Pemberton was not acting jointly with Dr. Michael and Yancy for hire, found that Pemberton's gratuitous response to an unsolicited letter from Dr. Michael was done for the purpose of causing an effect in Missouri and since the plaintiff subsequently claimed damages as a result of Dr. Michael's operation on him in Missouri, Dr. Pemberton had committed a tortious act within the state.

The place of the injury may be where the tort occurs for the purpose of establishing which law is applicable but it clearly has little or no bearing on the question of jurisdiction.

> ". . . we have rejected the argument that if a state's law can properly be applied to a dispute, its courts necessarily have jurisdiction over the parties to that dispute.

> '[The State] does not acquire . . . jurisdiction by being the "center of gravity" of the controversy or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved in this case by considering the acts of the (appellants). *"Hanson* v. *Denckla,* supra, 357 U.S. at 254, 78 S. Ct. at 1240".' " *Shaffer* v. *Heitner,* ..... U.S. ....., 97 S. Ct. 2569, 2586 (1977).

The *International Shoe* case and subsequent decisions of this Court have laid down certain requirements to establish "minimum contacts" under the Due Process clause. The first requirement is that the non-resident must do some act or consummate some transaction within the forum. A transaction can be consummated within a state by mail if it is a special contract, such as an insurance policy, and the state has specifically undertaken to regulate such contracts by legislation which subjects foreign insurers to suit within the state. *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 78 S. Ct. 199 (1957). But absent such special contractual relationship and special legislation, sending a letter into the forum state is not a significant minimum contact as will justify jurisdiction of the forum court. *Hanson* v. *Denckla, supra,* 357 U.S. 253, 78 S. Ct. at 1239; *Kulko* v. *Superior Court of California,* ..... U.S. ....., 98 S. Ct. 1690; *State of Missouri, ex rel. Bank of Gering* v. *Schoenlaub,* 540 S.W. 2d 31, 35 (Mo. 1976); *Trippe Mfg. Co.* v. *Spencer Gifts Co. Inc.*, 270 F. 2d 821, 823 (7th Cir. 1959); *Insull* v. *New York World Telegram,* 273 F. 2d 166, 171 (7th Cir. 1960); *Kulm* v. *Idaho First National Bank,* 428 F. 2d 616, 619 (8th Cir. 1970); *Aftanase* v. *Economy Baler Co.*, 343 F. 2d 187, 196 (8th Cir. 1965); *Desert Palace Inc.* v. *Silisbury,* 401 F. 2d 320, 322 (7th Cir. 1968).

In the instant case Dr. Michael's letter to Dr. Pemberton was unsolicited and unexpected. The reply was nothing more than a courtesy extended by one professional man to another. The exchange of letters was not a part of any commercial undertaking or a continuing operation.

The second requirement of minimum contacts is that the claim must arise out of or result from defendant's activities within the forum. Dr. Pemberton's letter was written and mailed in Utah. The effect of the exchange of letters was the same as if there had been a conference in Utah initiated by Dr. Michael. Whether or not Dr. Pemberton's letter may have influenced Dr. Michael is problematical but obviously Dr. Pemberton was not intending to create a particular effect in Missouri or anywhere else. The letter was not written to Sperandio and had no direct effect upon him. Dr. Michael was not the agent or servant of Pemberton and was not in any way subject to his control. Michael was free to reject or accept any information Pemberton gave him. Absent any duty to Sperandio, or any wrongful intent to injure him, Dr. Pemberton's letter was not a tortious act committed anywhere, and its effect, if any, upon the operation performed in Missouri by Dr. Michael was too remote and too speculative to satisfy the requirement of minimum contacts under the Due Process clause. *Wright* v. *Yackley*, 459 F. 2d 287, 289 (1972); *Taylor* v. *Portland Paramount Corp., supra,* at page 641; *Aftanase* v. *Economy Baler Co.*, 343 F. 2d 187, 197 (8th Cir. 1965)

The third requirement of minimum contacts is that the defendant must "purposely avail itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of the law." *Hanson* v. *Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 1240 (1958). Had Dr. Pemberton been employed by Sperandio to in-

struct and direct the activities of Dr. Michael or had Pemberton shipped some orthopedic device or surgical tool into Missouri for which he expected to be compensated, the case of *Jones Enterprise Inc.* v. *Atlas Service Corp.*, 442 F. 2d 1136 (9th Cir. 1971), the only case cited and relied on by the Missouri Supreme Court in its opinion, might be persuasive authority. But Pemberton did not contract to deliver anything, including information, to the forum state as did T. Y. Lin & Associates, Inc. in the *Jones* case. Nor did Pemberton know definitely as did Lin that his information would be used in the forum state or in any particular place. As far as Dr. Pemberton was concerned the information could be completely ignored and in fact Dr. Pemberton expected the marks that he placed on the x-rays would be erased by Dr. Michael. (Appendix B, page A37). Dr. Michael was a Missouri licensed doctor of medicine specializing in orthopedic surgery. Under normal circumstances it would be expected that any information he received from another doctor would be analyzed and evaluated by him in the light of his own education and experience and accepted, rejected or altered as he saw fit. The exchange of letters between the two doctors was not a consultation in the sense that one doctor consults with a specialist in another field and expects the specialist to be responsible for certain work in his specialty as where a surgeon consults a pathologist to examine tissue the surgeon has removed to determine if it is cancerous. In the instant case Dr. Michael was not only a licensed doctor of medicine but had specialized training in orthopedic surgery, and was simply endeavoring to increase his own knowledge and skill in that field by corresponding with an older, more experienced specialist in the same field. Dr. Pemberton recognized the situation and tried to be of assistance—not to Sperandio but to Dr. Michael. Under these circumstances it is impossible

to conceive of any possible benefit or protection that Dr. Pemberton might expect to receive under the laws of the State of Missouri. *Shaffer* v. *Heitner,* ..... U.S. ....., 97 S. Ct. 2569, 2586 (1977); *Hanson* v. *Denckla,* 357 U.S. 235, 253, 78 S. Ct. 1228, 1240; *Kulko* v. *Superior Court of California,* ..... U.S. ....., 98 S. Ct. 1690, 1701, 1702 (1978).

The fourth requirement of minimum contacts is that the assumption of jurisdiction must be consonant with the Due Process tenets of fair play and substantial justice. The Missouri Supreme Court had no trouble with this requirement. It simply announced, ex cathedra, that it seemed fair to the court to require Dr. Pemberton to travel to Missouri to defend the case rather than require plaintiff to travel to Utah to file suit. But is it fair and just?

This is not a products liability case where a large wealthy manufacturer located in some remote part of the country floods the market nationally with its product and then tries to discourage claims by contesting the jurisdiction of the states from which it derives its revenue. Here we have two individuals, a farmer and a doctor. Professional services—not a product—are involved. If there was any solicitation it was by Sperandio's agent, Dr. Michael, and it was in Utah not in Missouri. If the patient is willing to go to the doctor's state for treatment or advice it seems reasonable that he should be required to make a second trip to that state to lodge his complaints and to submit himself to the laws of that state to determine whether or not he has a valid claim. *Gelineau* v. *New York University Hospital,* 375 F. Supp. 661, 667 (D. N.J. 1974).

Looking at the factual situation from the doctor's standpoint it seems contrary to all notions of fair play

to insist that a doctor who treats a patient from another state or conducts tests or offers opinions must anticipate that he may be hauled off to the patient's state to answer complaints even though he obviously can foresee that any injuries the patient may sustain as a result of the treatment probably will manifest themselves in the patient's home state. *Shaffer* v. *Heitner, supra,* 97 S. Ct. at 2586. It seems even more unfair to hold that a doctor who gratuitously confers with a fellow doctor from another state about possible treatment of the latter's patient should anticipate having to defend himself in a state where he is not even licensed to practice and without being given the opportunity to refrain from submitting himself to the foreign state in such a manner. Had Sperandio specifically asked Pemberton to appear in Missouri where he is not licensed to practice it is reasonable to assume that Pemberton would have refused. If he was interested at all in forming a doctor-patient relationship with Sperandio it would have been in Utah or some other state in which Pemberton was licensed. As Sperandio argued in a prior brief, any practice of medicine by Pemberton in Missouri without a license might be considered malpractice.

One year after the 9th Circuit decided the *Jones* case, *supra,* upon which the Missouri Supreme Court relies, the Circuit Court published its opinion in *Wright* v. *Yackley,* 459 F. 2d 287 (9th Cir. 1972). This was a medical malpractice action filed in the United States District Court of Idaho against a South Dakota doctor. The plaintiff had been a patient of the defendant in South Dakota and then had moved to Idaho. She had difficulty in refilling a prescription given to her by the defendant while in South Dakota and wrote to the defendant for a copy of the prescription. This the defendant furnished to her by mail at no charge. The trial judge dismissed the action

for lack of jurisdiction and the Court of Appeals affirmed. In doing so it carefully distinguished this case from the situation presented in the *Jones* case and similar products liability and commercial transaction cases. The court's reasoning applies in all respects to the case at bar and succinctly states the reasons why certiorari should be granted in this case:

> "In the case of personal services focus must be placed on the place where the services are rendered, since this is the place of the receiver's (here the patient's) need. The need is personal and the services rendered are in response to the dimensions of that personal need. They are directed to no place but to the needy person herself. It is in the very nature of such services that their consequences will be felt wherever the person may choose to go. However, the idea that tortious rendition of such services is a portable tort which can be deemed to have been committed wherever the consequences foreseeably were felt is wholly inconsistent with the public interest in having services of this sort generally available. Medical services in particular should not be proscribed by the doctor's concern as to where the patient may carry the consequences of his treatment and in what distant lands he may be called upon to defend it. The traveling public would be ill served were the treatment of local doctors confined to so much aspirin as would get the patient into the next state. The scope of medical treatment should be defined by the patient's need, as diagnosed by the doctor, rather than by geography.
>
> This focus on the provision of medical services in the location where they are needed leads to the conclusion that the exercise of *in personam* jurisdiction in this situation would be unreasonable in terms of cer-

tain of the factors that must be balanced to determine compliance with due process. First, the amount of contact between defendant and forum state is determined by the chance occurrence of a resident of the forum state seeking treatment by the doctor while in the latter's state. From the very nature of the average doctor's localized practice, there is no systematic or continuing effort on the part of the doctor to provide services which are to be felt in the forum state. *Compare International Shoe Co.* v. *Washington,* 326 U.S. 310, 320, 66 S. Ct. 154, 90 L. Ed. 95 (1945). Second, the nature of the contacts is normally grounded outside of any relationship with the forum state. Unlike a case involving voluntary, interstate economic activity, for example, which is directed at various states in order to benefit from effects sought in those states, *compare McGee* v. *International Life Ins. Co.,* 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957); *Duple Motor Bodies Ltd.* v. *Hollingsworth,* 417 F. 2d 231 (9th Cir. 1969); *Jones Enterprises, Inc.* v. *Atlas Service Corp.,* 442 F. 2d 1136 (9th Cir. 1971), here the residence of a recipient in the forum state is irrelevant and incidental to the benefits provided by the defendant in his location. *See Tilley* v. *Keller Truck & Implement Corp.,* 200 Kan. 641, 649, 438 P. 2d 128, 134 (1968); Developments in the Law-State-Court Jurisdiction, 73 Harv. L.Rev. 909, 929 (1960). Thus the defendant is not one who 'purposefully avails itself of the privilege of conducting activities within the forum state.' *Hanson* v. *Denckla,* 357 U.S. 235, 253, 78 S. Ct. 1228, 1240, 2 L. Ed. 2d 1283 (1958). Nor are medical services comparable to acts performed by a nonresident for the very purpose of having their consequences felt in the forum state. *See* Currie, The Growth of the Long Arm, 1963 Ill.L.Forum

533, 549; Reese & Galston, Doing an Act or Causing Consequences as Bases of Judicial Jurisdiction, 44 Iowa L.Rev. 249, 260-61 (1959). p. 289.

Finally, the forum state's natural interest in the protection of its citizens is here countered by an interest in their access to medical services whenever needed. In our opinion, a state's dominant interest on behalf of its citizens in such a case as this is not that they should be free from injury by out-of-state doctors, but rather that they should be able to secure adequate medical services to meet their needs wherever they may go. This state interest necessarily rejects the proposition that the sufficiency of out-of-state treatment is subject to in-state inquiry. Thus, state interest in general, another of the factors relevant to a due process inquiry, *see McGee* v. *International Life Ins. Co., supra,* 355 U.S. at 223, 78 S. Ct. 199, 2 L. Ed. 2d 223; *Aftanase* v. *Economy Baler Co.,* 343 F. 2d 187, 197 (8th Cir. 1965) does not, in combination with the character of the other factors, suffice to support jurisdiction. p. 290.

We conclude that no tort was committed within the State of Idaho which would constitutionally confer jurisdiction under that state's long-arm statute. In terms of the constitutional translation offered by the Restatement, *supra,* the relationship between Idaho and appellee makes such jurisdiction unreasonable. Given the costs discussed above of extending Idaho's reach, mere foreseeability of the alleged effects occurring in Idaho is insufficient in the over-all context of appellee's South Dakota activity." p. 291.

Similar results have been reached in other medical malpractice and personal service cases. In *McAndrew* v. *Burnett,* 374 F. Supp. 460 (M.D. Pa. 1974), the U. S. District Court, dismissed plaintiff's wrongful death complaint where it appeared the plaintiff's deceased had been operated on in New York by the defendant, a New York resident doctor. Two years later the patient moved to Pennsylvania where x-rays revealed that defendant had failed to remove a hemostat. This was discussed between the patient, his wife and defendant doctor several times by phone and on one occasion defendant traveled to Pennsylvania to review the x-rays and visit with the patient. The Pennsylvania Long-Arm Statute is similar to the Missouri Statute. The court held that no tortious act had occurred in Pennsylvania even though the plaintiff alleged that her husband had died as a result of complications in removing the hemostat.

In *Gelineau* v. *New York University Hospital,* 375 F. Supp. 661 (D. N.J. 1974), the United States District Court, quashed service of process and dismissed the complaint where the plaintiff, a resident of New Jersey, alleged that he had contracted infectious hepatitis from blood administered in defendant's hospital in New York. The court held that the defendant was licensed and regulated by the laws of New York and that plaintiff had not relied upon any laws of New Jersey. Even though the defendant knew the plaintiff was a resident of New Jersey and would return to New Jersey after treatment and even though the plaintiff suffered the ill effects of the contaminated blood in New Jersey, the residence of the plaintiff was irrelevant to the issue of jurisdiction.

"When one seeks out services which are personal in nature, such as those rendered by attorneys, physicians, dentists, hospitals or accountants, and travels to the locality where he knows the services will actually be rendered, he must realize that the services are not directed to impact on any particular place,

but are directed to the needy person himself. While it is true that the nature of such services is that if they are negligently done, their consequences will thereafter be felt wherever the client or patient may go, it would be fundamentally unfair to permit a suit in whatever distant jurisdiction plaintiff may carry the consequences of his treatment, or the client the consequences of the advice received." p. 667.

* * *

"Such a ruling would have a chilling effect on the availability of professional services to non-residents. Professionals in the medical field, for example, concerned with one of the most rapidly advancing sciences of modern times, would be hesitant to treat a non-resident if they knew that thereafter, upon the receipt of a registered letter, they could be compelled to travel to a foreign state, and there to account, under the laws of that state, for the services which were sought from them and rendered by them at home. The issue is whether or not a physician, a hospital, or such, licensed only to practice in New York, having been sought out by a resident of the state of New Jersey, or even perhaps a resident of a foreign nation, should be required to defend a malpractice action in those respective forums based upon the standards of care and substantive law of those foreign forums. We think not." p. 667.

In the case at bar Sperandio, if he claims any contacts at all with Dr. Pemberton, must admit that it was through Dr. Michael and that Dr. Michael solicited advice from Dr. Pemberton in Utah and that Dr. Pemberton gave his advice in Utah. Certainly the mere foreseeability that the advice might be acted upon and might have an effect in Missouri should not be the sole determining factor,

as the Missouri Supreme Court has held, as to the exercise of personal jurisdiction by the Missouri courts over Dr. Pemberton. A more important consideration is that Dr. Pemberton, in writing to Dr. Michael, had no intention of creating any doctor-patient relationship with Sperandio or submitting himself to the jurisdiction of whatever state Sperandio happened to live in or receiving any benefit or protection from the laws of such foreign state. When he was served with Missouri process in the state of Utah he was understandably upset because the experience was totally contrary to all traditional ideas of fair play and substantial justice.

From the portions of the record submitted herewith the Court may suspicion that the plaintiff's complaint against Dr. Pemberton is completely unwarranted and frivolous in nature. If the Writ is granted and the case is fully presented to the Court this suspicion can be confirmed. Where such is the case even the Supreme Court of Illinois, which has taken the lead in extending state jurisdiction for the convenience of its own citizens, has acknowledged that non-resident defendants are entitled to some protection where the complaint is frivolous and a defense in the local forum would be burdensome.

> "An orderly and fair administration of the law throughout the nation requires protection against being compelled to answer claims brought in distant states with which the defendant has little or no association and in which he would be faced with an undue burden or disadvantage in making his defense. It must be remembered that lawsuits can be brought on frivolous demands or groundless claims as well as on legitimate ones, and that procedural rules must be designed and appraised in the light of what is fair and just to both sides in the dispute. Interpretations of basic

rights which consider only those of the claimant are not consonant with the fundamental requisites of due process." *Gray* v. *American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 170 N.E. 2d 761, 766 (1961).

CONCLUSION

The decision of the Supreme Court of Missouri represents an unwarranted extension of the principles laid down in *International Shoe Co.* v. *State of Washington, supra,* and would, if sustained, sanction a result that is neither fair, just nor reasonable. Publication of the Missouri Supreme Court opinion would hasten the demise of all restraint upon the exercise of personal jurisdiction over nonresidents by state courts. For this reason the case is of sufficient importance to the various states and to all individuals rendering personal services of one type or another to warrant this Court issuing its Writ of Certiorari to the Missouri Supreme Court.

Respectfully submitted,

EARL E. MCCLEAVE
JACK G. BEAMER
2100 Bryant Building
Kansas City, Missouri 64106
Telephone 842-0850
Attorneys for Petitioner

APPENDIX

ITEM 1/APPENDIX A

SUPREME COURT OF MISSOURI
EN BANC

No. 60411

STATE ex rel. LAWRENCE SPERANDIO,
Relator,
vs.
HONORABLE LEWIS W. CLYMER, Judge,
16th Judicial Circuit,
Respondent,

(Date of entry: April 10, 1978)

This is mandamus.

Relator Sperandio charges Harvey R. Michael (a Missouri doctor), Daniel L. Yancey (a Missouri doctor), Paul A. Pemberton (a Salt Lake City, Utah doctor), and others, with medical malpractice and other tortious conduct.

Sperandio consulted Doctor Michael regarding subluxation of the bones in his hip joints. Michael had heard Doctor Pemberton speak on congenital subluxation of the hip bones, and consulted Doctor Pemberton by mail. He sent the results of his clinical examination of Sperandio together with x-ray films to Pemberton in Salt Lake City, Utah. Pemberton wrote a letter of instruction to Michael and illustrated by drawing directly upon an x-ray negative the nature, direction and extent of the osteotomy required

to be made on Sperandio. On December 2, 1967, Sperandio submitted to surgery performed by Michael and Yancey.

On January 3, 1975, Sperandio filed a Petition for Damages in the Circuit Court of Jackson County, Missouri. Pemberton was named a defendant. Service of process on Pemberton was requested through the Sheriff of Salt Lake City, Utah.

On February 13, 1975, Pemberton filed a Motion to Quash Process and Return of Process and to Discharge Pemberton. On March 7, 1975, the motion was sustained.

On August 3, 1977, Pemberton was again served with summons and petition in Salt Lake City, Utah.

On September 19, 1977, Respondent sustained a Motion to Dismiss Pemberton.

On October 17, 1977, Sperandio petitioned this Court, in mandamus, seeking to have the order of September 19, 1977, set aside.

On November 14, 1977, our Alternative Writ of Mandamus was ordered to issue.

This case was argued and submitted on January 25, 1978.

Sperandio asserts that service of process on Pemberton in Utah was proper under the provisions of § 506.500, RSMo 1969, which reads in pertinent part as follows:

> "Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this section, thereby submits such person, firm, or corporation, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any such acts:
>
> * * *
>
> "(3) The commission of a tortious act within this state;
>
> * * *

In State ex rel. Deere and Company v. Pinnell, 454 S.W.2d 889, 892 (Mo. banc 1970), this Court declared that the ultimate objective of § 506.500, supra, "was to extend the jurisdiction of the courts of this state over nonresident defendants to that extent permissible under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States."

The "extent permissible under the Due Process Clause" was articulated by the United States Supreme Court in International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), as follows:

> "Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. *Pennoyer v. Neff*, 95 U. S. 714, 733. But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "

We believe the following "contacts" are sufficient in this case to satisfy due process under the teachings of

International Shoe: (1) Missouri has an interest in securing redress for its citizen who has had no contact with Utah and who was injured in Missouri; and (2) Doctor Pemberton's acts were performed for the purpose of causing an effect in Missouri. In our opinion, the maintenance of this suit in Missouri does not offend " 'traditional notions of fair play and substantial justice.' "

In Jones Enterprises, Inc. v. Atlas Service Corp., 442 F.2d 1136 (9th Cir. 1971), an action to recover damages for breach of contract for the collapse of an apartment building in Alaska, defendants appealed from an order denying their motions to quash service upon them. Defendants had contracted with plaintiff, a general contractor, to supply building materials and designs for the building which collapsed. When sued, defendants contended they were immune from the assertion of *in personam* jurisdiction in Alaska because they did not have sufficient contacts with Alaska to render them amenable to service of process. One defendant, a sub-subcontractor, T. Y. Lin & Associates ("Lin"), contended it had insufficient minimum contacts with Alaska because it had no physical contacts with the state and the wrong which it allegedly committed, supplying faulty designs to the contractor, did not occur within the state. The court, however, found that minimum contacts were established despite the absence of direct contacts with the state, by the fact that Lin knew that the ultimate destination of its work product was Alaska and that any harm suffered due to defective designs would be suffered in Alaska.

In the present case, Dr. Pemberton knew that the information which he conveyed to a Missouri physician and the designs which he drew on plaintiff's x-rays to illustrate the proposed operation would be utilized in Missouri to aid in performing an operation on a Missouri

resident. Sufficient minimum contacts were thus established in this case to make Dr. Pemberton amenable to service of process.

We express no opinion as to whether Sperandio has pleaded, or can prove, a cause of action against Doctor Pemberton. However, we believe that service of process in Utah was proper under the circumstances in this case and that the order of dismissal should be set aside.

The alternative writ of mandamus is made peremptory.

Robert T. Donnelly, Judge

Morgan, C.J., Bardgett, Rendlen, Seiler, JJ, Stockard, Sp.J., and Houser, Sp.J., concur. Henley and Finch, JJ., not sitting.

ITEM 2/APPENDIX A

IN THE MISSOURI COURT OF APPEALS
KANSAS CITY DISTRICT

No. KCD 29,573

STATE OF MISSOURI ex rel. LAWRENCE SPERANDIO,
Relator,

vs.

THE HONORABLE LEWIS W. CLYMER, Judge of the 16th Judicial Circuit, Jackson County Circuit Court, Division No. 8,
Respondent.

ALTERNATIVE WRIT OF MANDAMUS

(Date of entry: June 23, 1977)

TO THE HONORABLE LEWIS W. CLYMER,
Judge of the 16th Judicial Circuit,
Jackson County Circuit Court,
Division No. 8:

The petition for alternative writ of mandamus as to defendants, Paul A. Pemberton, M.D., and Harry B. Overesch, M.D., in Case No. CV75-0031, is denied by separate order this date, and

WHEREAS, it appears by the petition for alternative writ of mandamus, requesting that you have dismissed the claim to relief against defendant, William H. Snead, M.D., pending before you in Case No. CV75-0031, and that, as it is said, defendant William H. Snead, M.D., is liable for conspiratorial concealment of relator's condition and injuries, by reason of which the five year statute of limita-

tions applies as to the action against him rather than the two year statute of limitations for actions brought in medical malpractice, it is

ORDERED, that you set aside your order of dismissal as to defendant, William H. Snead, or in the alternative, that you show cause for your refusal to do so to this court on or before the 5th day of July, 1977; relator to have five (5) days thereafter to traverse the return, if any be filed.

Dated at Kansas City, Missouri, this 23rd day of June, 1977.

/s/ Jack P. Pritchard
Jack P. Pritchard, Chief Judge

All concur, except
Shangler, J., absent, and
Swofford, J., not participating.

IN THE MISSOURI COURT OF APPEALS
KANSAS CITY DISTRICT

No. KCD 29,573

STATE OF MISSOURI ex rel. LAWRENCE SPERANDIO,
Relator,

vs.

THE HONORABLE LEWIS W. CLYMER, Judge of the 16th Judicial Circuit, Jackson County Circuit Court, Division No. 8,
Respondent.

ORDER DENYING PETITION FOR ALTERNATIVE WRIT OF MANDAMUS AS TO PAUL A. PEMBERTON, M.D. AND HARRY B. OVERESCH, M.D.

(Date of Entry: June 23, 1977)

The petition for alternative writ of mandamus as to the requested relief that respondent set aside the order quashing service as to Paul A. Pemberton, M.D., entered March 7, 1975, in Case No. CV 75-0031, pending in the Sixteenth Judicial Circuit, having been considered, the same is hereby denied. State ex rel. Schulz v. Fogerty, 195 S.W.2d 908, 911[8,9] (Mo. App. 1946).

In the same case, No. CV 75-0031, the requested relief that the order of dismissal as to Harry B. Overesch, M.D., be set aside, the petition for alternative writ of mandamus is denied. Rule 74.04.

Dated at Kansas City, Missouri, this 23rd day of June, 1977.

/s/ Jack P. Pritchard
Jack P. Pritchard, Chief Judge

All concur, except
Shangler, J., absent, and
Swofford, J., not participating.

ITEM 3/APPENDIX A

IN THE
CIRCUIT COURT OF MISSOURI,
SIXTEENTH JUDICIAL CIRCUIT

No. CV-75-0031

Civil Docket C

LAWRENCE SPERANDIO,
Plaintiff,

vs.

HARRY R. MICHAEL, M. D., et al.,
Defendants.

ORDER

(Date of entry: March 7, 1975)

Defendant Paul A. Pemberton's motion to quash process and return of process and to discharge this Defendant is *sustained.*

Defendant Harry A. Overesch's motion to quash Summons, Service, and return of Summons is *sustained.*

Defendant, William H. Sneed's motion to dismiss Plaintiff's first amended petition is *overruled.*

/s/ Keith P. Bondurant
Keith P. Bondurant, Judge

Dated this 7th day of March, 1975.

Copies to: Mr. Jack G. Beamer
Mr. John C. Milholland
Mr. Roy F. Carter
Mr. E. J. Murphy

KPB:hmp

ITEM 4/APPENDIX A

IN THE
CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

NO. CV75-0031

DIV. NO. "C"

LAWRENCE SPERANDIO,
Plaintiff,

vs.

HARVEY R. MICHAEL, et al.,
Defendants.

ORDER

(Date of entry: Sept. 19, 1977)

Defendant Pemberton's Motion to Dismiss is hereby sustained.

IT IS ORDERED, ADJUDGED AND DECREED, that Paul A. Pemberton is dismissed from the captioned petition with prejudice to plaintiff refiling against defendant Pemberton in the State of Missouri.

/s/ Lewis W. Clymer
Lewis W. Clymer
Judge, Division 8

DATE: Sept. 19, 1977.

ITEM 1/APPENDIX B

IN THE
CIRCUIT COURT OF GREENE COUNTY, MISSOURI

Case No. 59644-3

LAWRENCE SPERANDIO,
Plaintiff

vs.

HARVEY R. MICHAEL, M.D.,
HARVEY R. MICHAEL, M.D., et al.,
Defendants

MOTION OF DEFENDANT PAUL A. PEMBERTON, M.D. TO QUASH PROCESS, TO QUASH PURPORTED SERVICE OF SUMMONS, AND TO QUASH PURPORTED RETURN ON SUMMONS, AND TO DISCHARGE THIS DEFENDANT FROM THIS ACTION

Comes now defendant Paul A. Pemberton, M.D., appearing specially for the purpose of this motion only, and states:

1. That this action was first instituted in the Circuit Court of Greene County, Missouri on November 28, 1969, and that this defendant was not then designated, in the original petition, as a defendant herein.

2. That this defendant was first designated as a defendant herein in the "First Amended Petition for Damages" filed by plaintiff July 8, 1974, which said "First Amended Petition for Damages" is incorporated herein as Exhibit A; that the purported "service" upon this defendant was purportedly made on July 31, 1974, in Salt Lake City, Salt Lake County, Utah, all as reflected by the

purported return on purported service of process filed herein, and herewith incorporated in this motion; that the said purported return on service of said summons reflected an attempted service of summons on this defendant on July 31, 1974 by a Deputy Sheriff of Salt Lake County, Utah, occurring in Salt Lake City, Utah.

3. That this defendant is, and at all times set forth in plaintiff's petition was, a resident of Salt Lake City, Salt Lake County, Utah, engaged in his profession as a licensed physician and surgeon practicing in the State of Utah; and that this defendant was at no time set forth in plaintiff's petition a resident of the State of Missouri, nor was he physically in the State of Missouri.

4. That this defendant at no time has engaged in the practice of his profession as a medical doctor, physician and surgeon, within the State of Missouri, and did not do so at any of the times set forth in plaintiff's petition.

5. That at no time prior to, during the times set forth in plaintiff's petition, nor since, has the plaintiff or any of his agents, servants or employees conferred with this defendant in his capacity as a licensed physician and surgeon, nor has this defendant at any of said times advised and counseled with plaintiff, or examined plaintiff or rendered medical treatment or surgery of any kind or character to plaintiff.

6. That Count I of plaintiff's said "First Amended Petition for Damages" alleges that this defendant undertook to and did advise and counsel with certain other defendant doctors herein, and undertook to offer them education and guidance in connection with matters set forth in plaintiff's said petition; that the only contact between this defendant and any other defendant herein, with reference to plaintiff, consisted of the receipt by this

defendant of a letter dated September 14, 1967, attached hereto as Exhibit B and incorporated herein, from defendant Harvey R. Michael, M.D., and a letter of September 21, 1967 written by this defendant to the said Harvey R. Michael, M.D., attached hereto as Exhibit C and incorporated herein; that on no other occasion did this defendant confer with Harvey R. Michael, M.D., or any other defendant herein, or any other person, firm or corporation, with respect to the subject matter of the said letters of September 14, 1967 (Exhibit B) and September 21, 1967 (Exhibit C).

7. That the matters set forth in Count I of plaintiff's said "First Amended Petition for Damages", even if proven, would not establish on the part of this defendant the transacting of any business within the State of Missouri, or the making of any contract within the State of Missouri, or the commission of a tortious act within the State of Missouri; and, further, that said Count I fails to set forth matters upon which relief can be granted as against this defendant.

8. That Count II of plaintiff's said "First Amended Petition for Damages" purports to charge, as best defendant can determine, that this defendant was engaged in a "general, covert and tacit agreement" with "many members and associates of the medical profession," denominated a "conspiracy"; that said Count II fails to set forth any acts or conduct on the part of this defendant in connection with said "conspiracy," and that this defendant did not at any time during the periods set forth in Count II of said petition have any contact whatever with plaintiff, and did not have any contact, communication or business of any kind or character with any other defendant herein, nor with any members and associates of the medical profession with respect to any agreement of the

type and kind referred to in said Count II, and was not a party to any such "conspiracy," nor was he a "co-conspirator"; that the allegations of Count II of said petition do not set forth a cause of action as against this defendant, nor do they set forth on the part of this defendant the transaction of any business within the State of Missouri or the making of any contract within the State of Missouri, or the commission of a tortious act within the State of Missouri; that the said Count II, therefore, fails to set forth a cause of action upon which relief can be granted as against this defendant. That this defendant was not employed in his professional capacity, or in any business or commercial relationship, in connection with plaintiff, or in connection with plaintiff's care, surgery or treatment, nor was this defendant engaged in a business or commercial activity, and that plaintiff's said petition does not set forth any business or commercial activity in which this defendant was so engaged at any of the times set forth in plaintiff's said petition; that this defendant was not, at any time referred to in said petition, in the State of Missouri.

9. That prior to receipt by this defendant of the letter dated September 14, 1967 from Harvey R. Michael, M.D. (Exhibit B), this defendant was not personally acquainted with the said Harvey R. Michael, M.D., nor had this defendant engaged in any professional activity or business or commercial enterprise with the said Harvey R. Michael, M.D.; that this defendant was not at any of the times set forth in plaintiff's petition personally acquainted with any other defendant herein; that the only contact of which this defendant has been advised between Harvey R. Michael, M.D. and this defendant occurring prior to the times set forth in plaintiff's said petition or during the times set forth therein was by the attendance of the said

Harvey R. Michael, M.D. at a lecture conducted by this defendant in Oklahoma City, Oklahoma.

10. That the matters set forth in plaintiff's said petition do not set forth and do not constitute a cause of action against this defendant, and do not set forth matters which would constitute the transacting of any business within the State of Missouri, or the making of a contract within the State of Missouri, or the commission of a tortious act within the State of Missouri, and that hence said petition upon its face establishes that service upon this defendant under the provisions of 506.500 and following is not proper and valid.

11. That the accompanying Exhibits A, B and C, together with the supporting affidavit filed herewith, and together with the testimony of this defendant elicited in Salt Lake City, Utah on March 16, 1972 in this cause, clearly establish that this defendant was not transacting any business within the State of Missouri at any times set forth in plaintiff's said petition or prior thereto; was not engaged in the making of any contract within the State of Missouri; and was not engaged in the commission of a tortious act within the State of Missouri at any of the times set forth in said petition, and, therefore, that the purported service of process upon this defendant in accordance with Sections 506.500 and 506.510 of the Missouri Statutes is not within the scope and purview of the said statutory sections, is contrary to law, does not subject this defendant to the jurisdiction of the courts of the State of Missouri, and that said process, purported service of summons, and purported return on summons should therefore be quashed and this defendant discharged from this action.

12. This defendant further states that the subjecting of this defendant to the jurisdiction of the courts of

Missouri in accordance with Section 506.500 would, if permitted, constitute a denial of due process to this defendant under the Constitution of the State of Missouri and under the Constitution of the United States of America; that if defendant were so held to be subject to the jurisdiction of the courts of Missouri, this defendant would thereby be deprived of his rights, without due process of law, contrary to the mandate of the Fourteenth Amendment to the Constitution of The United States of America, Paragraph 1; in addition, this defendant would thereby be deprived of his rights vested in him under Article I, Section 10, of the Constitution of 1945 of the State of Missouri.

WHEREFORE, defendant Paul A. Pemberton, M.D. prays the Court to quash the process issued herein as against this defendant, to quash the purported service of summons herein upon this defendant, to quash the purported return on purported service of summons herein upon said defendant, and to discharge this defendant herefrom, in accordance with this motion.

Turner, Reid & Duncan
By /s/ Meredith B. Turner
Attorneys for Defendant Paul A. Pemberton, M.D.

STATE OF MISSOURI)
) SS.
COUNTY OF GREENE)

AFFIDAVIT

MEREDITH B. TURNER, being duly sworn, states that the matters set forth in the above and foregoing motion are true according to his best information and belief, and that he makes this affidavit as attorney and agent for defendant Paul A. Pemberton, M.D.

/s/ Meredith B. Turner

Subscribed and sworn to before me this 30 day of August, 1974.

/s/ Ruth H. Roberts
(Seal) Notary Public

My commission expires 11/4/75.

Turner, Reid & Duncan
Empire Bank Building
Glenstone at Sunshine
Springfield, Missouri
Attorneys for Defendant
Paul A. Pemberton, M.D.

ITEM 2/APPENDIX B

IN THE
CIRCUIT COURT FOR THE SIXTEENTH
JUDICIAL CIRCUIT OF MISSOURI

No. Cv. 75.0031

CIVIL C

LAWRENCE SPERANDIO
Verona, Missouri,
Plaintiff,

vs.

HARVEY R. MICHAEL, M.D., 1211 South Glenstone, Springfield, Missouri, and DANIEL L. YANCEY, M.D., 1211 South Glenstone, Springfield, Missouri, and PAUL A. PEMBERTON, M.D., 702 East South Temple Street, Salt Lake City, Utah, and WILLIAM H. SNEAD, M.D., 118 Professional Building, Springfield, Missouri, and D. E. CAYWOOD, 1211 South Glenstone, Springfield, Missouri, and DAVID A. FARDON, M.D., 630 Concord Street, Knoxville, Tennessee, and HARRY A. OVERESCH, M.D., 6400 Prospect Avenue, Kansas City, Missouri,
Defendants.

PETITION FOR DAMAGES

(Filed January 3, 1975)

Comes now the plaintiff within one year next after having dismissed without prejudice his case in the Circuit Court of Greene County, Missouri, Number 59644-3, entitled Lawrence Sperandio, plaintiff versus Harvey R. Michael, M.D., Daniel L. Yancey, M.D., Paul A. Pemberton, M.D., William N. Snead, M.D., D. E. Caywood and David A.

Fardon, M.D., defendants, and refiles it in this Court and for his claims alleges and states:

COUNT I.

1. Defendants Michael and Yancey are and were, at all times mentioned herein, licensed physicians and surgeons specializing in orthopedics and as such held themselves out to the public at their offices at Springfield, Missouri, as available and willing to render medical and surgical care and treatment for hire to members of the public, including plaintiff.

2. Defendant Pemberton is a licensed physician and surgeon who practices orthopedic surgery in Salt Lake City, Utah, and who holds himself out to the medical profession as an expert in a surgical operation procedure which he invented and developed and which bears his name, being commonly called the "Pemberton Procedure" but which defendant Pemberton describes as "Pericapsular Osteotomy of the Ilium for Treatment of Congenital Subluxation and Disclocation of the Hip."

3. Said "Pemberton Procedure" was conceived and developed for use on children, to take advantage of both the natural plasticity which occurs in the hip joint of a child and of the natural and expected further growth in the hip joint of a child. Said natural plasticity and further expected growth are not present in the hip joints of adults. The upper age limit for use of the unmodified technique for said Pemberton Procedure is twelve to fourteen years.

4. On or about September 12, 1967, at the reference of his family physician at Monett, Missouri, and for valuable consideration, plaintiff engaged the services of defendant Michael and so many of defendant Michael's associate physicians as defendant Michael should deem to

be necessary to examine, consult, advise and treat plaintiff for an orthopedic condition and problem with plaintiff's hips and that, thereafter, relying upon the advice of defendants Michael, Yancey and Pemberton and with expectation of benefits to be derived therefrom, on or about December 2, 1967, at the Springfield Baptist Hospital, Springfield, Missouri, plaintiff submitted to surgery performed upon his left hip by defendants Michael and Yancey, in consultation with defendant Pemberton, all of whom were therein acting in concert, each for the other and as joint venturers and joint adventurers and partners in the medical and surgical care, management and treatment of plaintiff for hire.

5. Prior to submitting to said surgery, defendants Michael, Yancey and Pemberton told plaintiff that plaintiff was afflicted with a deformity of his hips with a resulting condition of subluxation of the femoral heads; that said condition of subluxation was the cause of pain to plaintiff and that unless plaintiff submitted to surgery to remedy and remove the condition of subluxation, the pain would grow progressively worse; that by use of the Pemberton Procedure as modified for use on adults the condition of subluxation could be eliminated and that the modified Pemberton Procedure was advisable for use in his case; plaintiff had a right to rely upon said advice and did rely thereon.

6. The Pemberton Procedure surgical operation had never theretofore been performed upon an adult in the Springfield, Missouri, area; neither defendant Michael nor defendant Yancey had ever before performed a Pemberton Procedure operation on an adult; they knew that the unmodified technique developed for and used on children could not be used successfully on an adult; neither knew what necessary modifications were needed to the tech-

nique used on children to make it suitable and in keeping with accepted medical standards and risks when used on an adult (including plaintiff); neither knew the modifications to the Pemberton technique which had been made by its inventor, defendant Pemberton; neither defendant Michael nor defendant Yancey knew how to do the surgery on an adult when they undertook to operate on plaintiff and in undertaking to operate on plaintiff they were experimenting, all of which was wrongfully and intentionally concealed from the plaintiff prior to surgery; plaintiff did not give his consent to experimentation upon his person and defendants operated upon plaintiff without his informed consent and without his consent.

7. Defendants Michael and Yancey, prior to committing surgery on plaintiff, consulted with defendant Pemberton about plaintiff's hip conditions and defendant Pemberton undertook to and did advise and counsel with them and undertook to offer them education and guidance in their use of said Pemberton Procedure on the left hip of plaintiff and in overtly acting and carrying out such guidance, wrote a letter of instruction to defendant Michael, purporting thereby to educate defendants Michael and Yancey in the modifications to the Pemberton technique which were necessary to perform the operation on plaintiff and illustrated by diagram and drawing directly upon an x-ray negative made of plaintiff's left hip the nature, direction and extent of the osteotomy required to be made in the use of the modified Pemberton procedure on plaintiff. Defendant Michael told plaintiff of the consultation with defendant Pemberton, told plaintiff of defendant Pemberton's agreement with defendant Michael in the desirability of using the modified Pemberton operation on plaintiff's left hip, showed plaintiff the x-rays of his hips, including that film which had been marked by defendant Pemberton, and told plaintiff that defendants intended

to follow said diagramed plat of the proposed osteotomy, and plaintiff relied thereon, as abovesaid.

8. Defendants Michael and Yancey relied upon the advice and written instructions sent to them by defendant Pemberton to furnish them, for guidance and action in surgery on plaintiff, the details of the necessary modification of the "Pemberton technique" for performing the Pemberton Procedure on an adult, namely the plaintiff, and defendants Michael and Yancey made no independent surgical judgment to modify, vary or alter the Pemberton technique based upon their experience, education or any other criteria but in operating on plaintiff, followed said written directions as they were able to read them in the consultation letter of instruction written to them by defendant Pemberton but disregarded and did not follow the drawing instruction made by defendant Pemberton on the x-ray film of plaintiff's left hip.

9. In undertaking to advise and counsel defendants Michael and Yancey in the care, surgery and management of plaintiff, defendant Pemberton carelessly and negligently failed to properly instruct them in the necessary modifications to the Pemberton Procedure technique used in children to make it safe, desirable and effective for use in adults and as a direct and proximate result of such carelessness and negligence on his part, defendant Pemberton combined and concurred in the carelessness and negligence of defendants Michael and Yancey in their performing surgery which they did not understand and which consequently were not qualified to do and in failing to make the required modifications when they used the Pemberton Procedure on plaintiff to plaintiff's direct and proximate damage as hereinafter set out.

10. As a direct and proximate result of the above and foregoing carelessness and negligence on the part of de-

fendants Michael, Yancey and Pemberton, jointly and severally, defendants further carelessly and negligently failed to make required modifications in the Pemberton Procedure for use on adults and thereby caused themselves to negligently exert excessive force upon the left acetabulum of plaintiff and fractured it, replaced one fractured part of the acetabulum with a screw and carelessly and negligently exerted further excessive force and bent the screw and misplaced the broken part of the acetabulum; were unable to move the roof of the acetabulum the required distance to remedy the subluxation of plaintiff's left femoral head as a direct and proximate result of the abovesaid failure to modify the surgical technique; introduced a bone graft over the head of the femur; they carelessly and negligently ran the surgical screw into the joint space of the left hip; they carelessly and negligently ran the surgical screw into the head of the femur, they carelessly and negligently reduced the joint space by the excessive force exerted and the fixation accomplished by bone grafts, blocks and surgical screw and they negligently damaged the articular cartilage of the left hip joint, none of which abovesaid occurrence is the expected, intended or careful result of a properly performed Pemberton Procedure modified for use in an adult and all of which was performed to the directly and proximately resulting damage of plaintiff.

11. Thereafter, defendants discharged plaintiff from the hospital to his home with knowledge that plaintiff had an infection at the operative site and negligently and carelessly failed and refused to treat and cure said infection promptly but suffered it to worsen and increase without treatment or medication, all of which directly and proximately caused plaintiff great pain and mental anguish, lengthened the period of rehabilitation from the effects of surgery, caused him to undergo prolonged hospitaliza-

tion and medical treatment of said infection beyond that which would have been required if defendants had exercised the standards of reasonable medical care prevailing in said community in the prompt attention to and treatment of infections following surgery, all to the damage of plaintiff.

12. Defendants Michael, Yancey and Pemberton all had a duty to tell plaintiff what had occurred in his care and treatment, including the facts that defendant Pemberton, after undertaking to consult with defendants Michael and Yancey in the care and treatment of plaintiff, carelessly and negligently by his said letter had misdescribed the necessary surgical technique to effectively perform the Pemberton Procedure upon plaintiff, an adult, and had thus and thereby joined in committing malpractice in the care and management of plaintiff to plaintiff's damage and that the Pemberton Procedure surgery attempted on plaintiff had not in fact remedied and removed the condition of subluxation of the femoral head in plaintiff's left hip; said defendants actively concealed such facts from plaintiff and further affirmatively falsely represented to plaintiff that his left hip bones had been moved to a proper position and that the intended result of surgery in the position of the hip bones had been achieved and defendants so represented to plaintiff with the intent and knowledge that plaintiff would believe and rely thereon and the fact that plaintiff possessed a justiciable claim against defendant Pemberton thereby should be concealed from plaintiff. Plaintiff further states that he made diligent inquiry and investigation and did not become apprised of the facts constituting his claim against defendant Pemberton until on or about May 30, 1974, and did not know of said claim before that date because of the active fraudulent concealment of said claim by defendants Michael, Yancey and Pemberton.

13. Plaintiff further states that as a direct and proximate result of each and all of the above and foregoing acts and omissions of carelessness and negligence on the part of defendants and each of them his left hip joint was injured and damaged, the joint space and the articulating surfaces and investments thereof permitted and caused to deteriorate and to be destroyed ,the use and functions and motion and range of motion of said hip and its constituent elements and organs were caused to be permanently and irreversibly diminished, impaired and destroyed and plaintiff has thereby been caused to suffer pain and mental anguish and physical disability and will in the future so be caused to suffer; his pre-existing orthopedic problem in his hips has been aggravated and worsened and related structures have been damaged and have suffered resultant impaired function; plaintiff's ability to work and labor has been permanently impaired, diminished and destroyed; further medical treatment of plaintiff's left leg and left hip has been made more difficult, expensive, painful and distressing; plaintiff has incurred additional expenses for hospitalization and treatment and will require medicines, medical treatment, surgery and hospitalization in the future; plaintiff has been caused to lose income and will in the future suffer loss of income, all to his damages in the sum of one hundred fifty thousand dollars ($150,000.00).

WHEREFORE, plaintiff prays judgment against the defendants and each of them in the sum of one hundred fifty thousand dollars ($150,000.00) and for his costs herein incurred.

COUNT II.

(Omitted as not being relevant to the issues raised in this proceeding.)

WHEREFORE, plaintiff prays judgment against the defendants and each of them for compensatory damages

in the sum of one hundred thousand dollars ($100,000.00), prays judgment against defendants and each of them for exemplary and punitive damages in the sum of five hundred thousand dollars ($500,000.00) and for his costs herein expended.

E. J. Murphy
7 North Main
Butler, Missouri
Telephone 679-3981

and

Anderson & Milholland
By /s/ John C. Milholland
John C. Milholland
302 East Pearl Street
Harrisonville, Missouri 64701
Telephone 884-3218
Attorneys for Plaintiff

21. Plaintiff requests out-of-state personal service of process to be made upon defendants Paul A. Pemberton and David A. Fardon pursuant to the terms of Sections 506.500 and 506.510, RSMo, made and provided, directing process for defendant Pemberton to:

Sheriff of Salt Lake County, Utah
Civil Division
Salt Lake City, Utah 84101

and process for defendant Fardon to:

Sheriff of Knox County, Tennessee
Criminal Court Building
Knoxville, Tennessee 37902

/s/ John C. Milholland
John C. Milholland
Attorney for Plaintiff

ITEM 3/APPENDIX B

IN THE
CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

NO. CV-75-0031

CIVIL - C

LAWRENCE SPERANDIO,
Plaintiff,

vs

HARVEY R. MICHAEL, M.D.
ET AL.,
Defendants.

SEPARATE MOTION OF DEFENDANT PAUL A. PEMBERTON TO QUASH PROCESS AND RETURN OF PROCESS AND TO DISCHARGE THIS DEFENDANT

(Filed February 13, 1975)

1. Comes now defendant Paul A. Pemberton, appearing specially for the purpose of this motion and for no other purpose, and moves the court to quash summons and return of process as to this defendant for the reason that the court does not have personal jurisdiction over defendant Paul A. Pemberton inasmuch as this defendant was not served with process within the State of Missouri and the attempted service in Salt Lake City, Utah by a deputy sheriff of Salt Lake County, Utah was invalid and a nullity under the Commerce clause (Article 1 § 8) the Equal Protection clause (14th Amendment § 1) the Due Process clause (14th Amendment § 1) and Expost Facto clause (Article 1 § 10) of the Constitution of the

United States and of Article 1 §§ 2, 10 and 13 of the 1945 Constitution of the State of Missouri and failed to comply with the requirements of Mo. RS 1959 §§ 506.500 and 506.510 in that the petition fails to set out facts authorizing out of state service and the return of process is not accompanied by an affidavit stating the time, manner and place of service of process.

2. In support of his motion this defendant states that at all times set forth in plaintiff's petition he was a resident of Salt Lake City, Salt Lake County, Utah, engaged in his profession as a licensed physician and surgeon practicing in the state of Utah and that at no time set forth in plaintiff's petition was he a resident of the state of Missouri nor was he physically in the State of Missouri nor transacted any business within the State of Missouri nor made any contracts within the State of Missouri nor committed any tortious act within the State of Missouri nor owned, or possessed or used any real property within the State of Missouri nor contracted to insure any personal property or risk within the State of Missouri.

3. The only contact between this defendant and the other defendants herein with reference to plaintiff consisted of a receipt by this defendant of a letter dated September 14, 1967, attached hereto as Exhibit B and incorporated herein, from defendant Harvey R. Michael and a letter of September 21, 1967 written by this defendant to the said Harvey R. Michael attached hereto as Exhibit C and incorporated herein. On no other occasion did this defendant confer with Harvey R. Michael or any other defendant herein or any other person, firm or corporation with respect to plaintiff or the subject matter of said letters of September 14, 1967 (Exhibit B) and September 21, 1967 (Exhibit C).

4. In further support of his motion defendant Pemberton incorporates herein as though fully set out the affidavit prepared and sworn to by him on the 10th day of February, 1975, which is attached hereto as Exhibit A.

WHEREFORE, defendant Paul A. Pemberton prays the court to quash the summons heretofore issued herein addressed to this defendant and to quash the purported return of service of said process upon this defendant and to discharge this defendant from further proceedings herein.

McKenzie, Williams, Merrick, Beamer & Wells

By /s/ Jack G. Beamer
Jack G. Beamer

1100 Bryant Building
Kansas City, Mo. 64106

Attorneys for defendant Pemberton

STATE OF MISSOURI)
) SS
COUNTY OF JACKSON)

Jack G. Beamer of lawful age being duly sworn states that the matters set forth in the above and foregoing motion and the exhibits attached thereto are true according to his best knowledge and belief and that he makes this affidavit

Exhibit A

IN THE
CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

NO. CV-75.0031

CIVIL - C

LAWRENCE SPERANDIO,
Plaintiff,

vs.

HARVEY R. MICHAEL, M.D.
ET AL.,
Defendants.

**Affidavit of Defendant Paul A. Pemberton, M.D.
in Support of Motion to Quash**

(Filed February 13, 1975)

STATE OF UTAH)
) SS
COUNTY OF SALT LAKE)

Paul A. Pemberton, being duly sworn, states:

My name is Paul A. Pemberton, and I am a duly licensed physician and surgeon, residing in Salt Lake City, Utah, and having my professional office at 1220 East 3900 South Street. I attended Willamette University, Salem, Oregon, for my pre-medical training, and then attended the University of Oregon Medical School, Portland, Oregon, graduating in 1929. My internship was at Multnomah County Hospital, Oregon, and I then practiced in Woodburn, Oregon for eight years. I then joined Cleveland Clinic as Orthopedic Fellow for two years, and then the

University of Oklahoma, Crippled Children Hospital, for one year. I then served as Research Fellow for the American Orthopedic Association for one year, returned to the orthopedic staff of the Cleveland Clinic for three months, and then entered the military service in November, 1942, serving 39 months in the Medical Corps in orthopedic surgery. Upon leaving the service, I entered private professional practice in Salt Lake City, Utah, where I have been in private practice at all times to the present. I am certified by the American Board of Orthopedic Surgery as qualified to practice orthopedic surgery as a specialist.

From March of 1943 to about February of 1944, during my period of service with the Medical Corps, I was stationed at Jefferson Barracks in Missouri and resided temporarily in Kirkwood, Missouri, and was in orthopedics. At no other time have I resided in the State of Missouri, nor have I at any time had an office for practice, nor practiced my profession in Missouri. I have not been present in the State of Missouri at any other time.

In September, 1967, I received a letter from Dr. Harvey R. Michael, M. D., Springfield, Missouri, that letter being Exhibit B attached to the motion filed in my behalf. Accompanying that letter were x-rays, as referred to in the letter, of a Mr. Lawrence C. Sperandio. After reviewing the x-rays and the content of Dr. Michael's letter, I then wrote and mailed to Dr. Michael my letter of September 21, 1967, being Exhibit C attached to my motion. I had no communication of any kind, oral or written, with Dr. Michael other than the above-described correspondence, and I heard nothing further about Mr. Sperandio until I was advised of the filing of a lawsuit by Mr. Sperandio in Springfield, Missouri.

At no time did I see, examine, or in any manner treat Mr. Sperandio, nor have I done so to the present

time. I was not advised at any time by any person as to the details of surgery performed upon him or as to his subsequent progress until I learned of the filing of his lawsuit. I did not at any time from September 14, 1967 to Feb., 1974 consult with or advise either Mr. Sperandio or Harvey R. Michael, M. D., Daniel L. Yancey, M. D., William H. Snead, M. D., D. E. Caywood, or David A. Fardon, M.D., concerning Mr. Sperandio; the two letters, Exhibits B and C, constitute my sole contact.

I was not acquainted with Dr. Michael prior to receiving his letter (Exhibit B) and had never met him prior to the date of his letter. I later was introduced to him or to Dr. Yancey, I am not sure which, at a professional seminar or meeting in some other state, but do not recall any discussion of the Sperandio matter. I was not and am not acquainted with Daniel L. Yancey, M. D., William H. Snead, M.D., D. E. Caywood, or David A. Fardon, M.D., and have never communicated in any manner with them or any of them concerning Mr. Sperandio. I did not go to the State of Missouri for any purpose after receiving Dr. Michael's letter, and I have never practiced my profession in Missouri nor have I ever been engaged in any business or commercial venture in the State of Missouri. My letter to Dr. Michael was gratuitous; I was not promised nor paid any compensation for the letter or for any other matters pertaining to Mr. Sperandio. My sole contact with anything involving Mr. Sperandio was the letter from Dr. Michael and my response, as above described.

I am not a party to, nor have I ever been a party to, any agreement, oral or written, with the other defendants in this case or with members and associates of the medical profession for the purpose of concealing knowledge of medical malpractice from patients of any physicians,

including Mr. Sperandio, and I emphatically deny the truth of the content of Paragraph 3 of the Second Count of plaintiff's petition in which I am named as a defendant.

/s/ Paul A. Pemberton
Paul A. Pemberton, M. D.

Subscribed and sworn to before me this 10th day of February, 1975.

/s/ Earl S. Wright
Notary Public

My commission expires 1-10-76.

Exhibit B

September 14, 1967

Paul Pemberton, M.D.
72-E South Temple
Salt Lake City, Utah

Re: Mr. Lawrence C. Sperandio, age 38

Dear Doctor Pemberton:

During my Orthopaedic Surgery Residency at the University of Oklahoma Medical Center I became quite interested in the problem of congenital hip dislocation. I think this interest was primarily because of several visits that you made to Oklahoma City during that period of time and the very instructive sessions that we had with you during your visits. I have been in private practice in Springfield, Missouri, since July 1, 1967, and to date have not seen a congenital hip dislocation in a child. However, I feel that the above-captioned patient represents an old congenital dysplasia with residual shallow acetabula.

This man is 38 years old, from Verona, Missouri, and gives a history that he had not noted any difficulties with his hips until about four or five years ago. At that time he began noticing some pain in his hips if he had walked for long distances. This has gotten progressively more severe in recent months and at the present time is beginning to have a moderate degree of pain at night. This man is a farmer and states that he is on his feet a great deal of time.

EXAMINATION: It is interesting to note that he has almost a normal range of motion in both hips. He

does have bilateral positive Trendelenburg signs. He has a very slight list to the left. He walks without a limp.

X-RAYS: As you will note, his x-rays show very shallow acetabulae bilaterally and the flattening and widening of the femoral heads bilaterally. Some minimal subluxation of both femoral heads noted.

As I mentioned above, it was my impression that this probably represents an old congenital dysplasia. He certainly does not have adequate coverage over his femoral heads and even though I can see very little arthritic changes, I think these changes are inevitable unless something is done to adequately cover the femoral heads.

I would appreciate very much your opinion as to what you think the etiology of his present hip problem is as well as what you would consider the most satisfactory treatment. I know that you have mentioned, during your visits to Oklahoma City, doing periacetabular osteotomy in adults. I think that I am fairly familiar with this procedure in children, but I know that the operation must be altered when done in the adult patient. I would like, first of all, to have your opinion as to whether you feel this operation is indicated in this particular patient, and secondly, what alterations in the procedure are necessary in the adult.

With kindest personal regards, I remain,

Sincerely,

Harvey R. Michael, M.D.

HRM: dm

Exhibit C

September 21, 1967

Harvey R. Michael, M.D.
Smith-Glynn-Calloway Clinic
1211 South Glenstone
Springfield, Missouri

Re: Laurence C. Sperandio

Dear Dr. Michael:

I believe you are right in your opinion that this was a bilateral congenital subluxation of the hip or hip dysplasia. There is a break in Sheton's line on both sides, widening of the tear drop distance and some coxa magna. This is worse on the left than the right.

You will note also that he is now getting cystic changes in the superior portion of the acetabulum with a small one just at the acetabular rim on the right and a rather large cyst extending up into the ilium a considerable distance on the left side.

The problem as to what should be done here in a man of this age who has to be on his feet most of the time is a serious one. The usual arthroplasty procedures with either a cup or a prosthesis do not give a dependably high enough percentage of good results to be warranted except with the understanding that the man might have to change his occupation.

The operation that I have been doing in the adult has been a modification of the one that I have developed for the congenital hip in a child. The principal on which it is based is that by increasing stability and avoiding the apparent sliding or unequal weight distribution between the femoral head and the acetabular rim, the wear on the articular cartilage might be diminished and symptoms or disability cut down because of this. The technique of the operation has been to proceed with the osteotomy of the ilium as in a child except that the osteotomy is carried on down past the fused tri-radiate cartilage to the level of the lower border of the acetabulum between the plates of the ischium and then by prying this whole acetabulum outward, a controlled fracture occurs through the outer table of the ischium at a level below the inferior portion of the acetabulum. The detached fragment then can be propped out with a wedge of bone in a similar manner to that done in children. I have drawn this out on the left hip in one of the x-rays that I am returning to you. I used a wax pencil that you can wipe off since I don't like my x-rays marked up and I don't want to mark up someone else's.

If you do this, be careful that the osteotome does not break through into the acetabulum at least until it is well down on the medial side. If it doesn't get clear down to the inferior portion of the acetabulum but breaks off below the part that will be on the superior surface of the head, this is not too great a technical error and the results should be good. What we are trying to do is put the remaining unabraded portion of the acetabular cartilage out over the top of the femoral head where also there should be good articular cartilage lateral to the present point of excessive weight bearing.

Post operative care would be about what it was in children with two months in a cast and then crutches for about another thirty days. I would suggest doing one hip at a time and then waiting some months before the other is done.

I have done quite a number of these now and they have worked out well. This is done only for pain and not just for the x-ray appearance. From an x-ray standpoint, this man's left hip is considerably worse than the right and I believe I would prefer to do this side first unless his symptoms are a great deal worse on the right.

Let me know if there is any other question you have about this and also if you do go ahead with this procedure, I would like to hear from you as to how it works out.

I appreciate your kind words about my very enjoyable visit to Oklahoma City.

Yours very sincerely,

/s/ Paul A. Pemberton
Paul A. Pemberton, M.D.

PAP/jp

ITEM 4/APPENDIX B

IN THE
CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

No. CV-75-0031

CIVIL—C

LAWENCE SPERANDIO,
Plaintiff,

vs.

HARVEY R. MICHAEL, M.D., ET AL.,
Defendants.

AFFIDAVIT

STATE OF MISSOURI)
) ss.
COUNTY OF CASS)

John C. Milholland, of lawful age and being duly sworn states:

On March 16, 1972, I attended a deposition given in Salt Lake City, Utah, by Paul A. Pemberton who is the same Paul A. Pemberton who is defendant in the above entitled action. His deposition was given pursuant to defendants' notice served on plaintiff in a prior action then pending in which Lawrence Sperandio was plaintiff and Harvey R. Michael, Daniel L. Yancey and Carl Virgien were defendants and which arose out of the same medical and surgical treatment-of-plaintiff transaction as does this action. No subpoena for said witness was produced or exhibited.

Four sheets of questions and answers attached hereto and made a part of this affidavit are accurate xerox copies

of the same numbered pages of said deposition by Paul A. Pemberton, who was speaking then and there under oath of and about the plaintiff's physical condition and treatment, being reproductions of pages 14, 15, 16 and 61 of said Pemberton's deposition.

Further affiant sayeth naught.

/s/ John C. Milholland
John C. Milholland

Subscribed and sworn to before me the undersigned Notary Public this 18th day of February, 1975.

/s/ Judy A. Bell
Judy A. Bell
(Seal) Notary Public
My commission expires 7/17/78.

Exhibit 1 with four sheets of attachment, pages 14, 15, 16 and 61 of a deposition by Paul A. Pemberton

[14] (Marked for identification purposes Defendant Michael's Exhibit A).

Q. Dr. Pemberton, I am going to hand you what has been marked Defendant Michael's Deposition Exhibit A and ask you to identify that, please.

A. This is a photo copy of a letter Dr. Michael wrote to me September 14, 1967.

Q. Is this the first written communication you had ever had from Dr. Michael to your knowledge?

A. As far as I know.

Q. You have no social relationship with Dr. Michael?

A. No.

Q. You have no family relationship with him?

A. That is true.

Q. In Dr. Michael's letter of September 14, 1967, marked Defendant Michael's Exhibit A, did you feel that the letter and the supplementary X-rays which were sent with the letter were adequate for you to diagnose that Mr. Sperandio had congenital hip dysplasia?

A. Yes.

Q. Was this information sent to you by Dr. Michael also adequate for you to be able to make a determination as to the best available operative procedure to use to correct Mr. Sperandio's condition?

A. Enough that I could have an opinion as to how I would [15] suggest it be treated.

Q. Doctor, what was your opinion as to how it should be treated?

A. That iliac osteotomy or Pericapsular osteotomy would be expected to improve his condition.

Q. And what you have just described—in other words, the operative procedure—again is known as the Pemberton Procedure, is that correct?

A. Yes.

(Marked for identification purposes Defendant Michael's Exhibit B).

Q. Doctor, I am going to hand you what has been marked Defendant Michael's Exhibit B, which is an X-ray carrying the name Smith, Glenn, Calloway Clinic, Springfield, Missouri, and the name "Sperandio, Mr., Lawrence", and ask that you put that in the view box, please.

Doctor, is this Exhibit B one of the X-rays which was sent to you by Dr. Michael with the letter of September 14, 1967?

A. Yes.

Q. Doctor, I see that there has been a mark or marks made upon that X-ray. Do you recognize those marks?

A. I think they are the ones I put on there.

Q. Does it appear they have been put on there with a wax pencil of some sort?

[16] A. Yes.

Q. Doctor, would you tell me what the more or less longitudinal mark on that X-ray indicates?

A. That is the site of the osteotomy which I recommended be made to release the Acetabulum.

Q. This osteotomy is made with an instrument?

A. Yes. It is a thin blade chisel type with a slight curve in it.

Q. Is it electrically operated?

A. No, it is driven in with a mallet.

Q. Then there is a lateral jagged line which connects to the more or less longitudinal line?

A. Yes.

Q. What does that jagged line indicate?

A. That indicates site of a controlled fracture after the osteotomy is carried out.

Q. Doctor, I will ask you to take that X-ray out of the view box and mark close to the longitudinal line and again close to the jagged line with a wax pencil your initials, please, and by doing so indicate those are your marks made on that X-ray?

A. (Indicating).

Q. Re-inserting the X-ray into the view box I am still speaking of Defendant's Exhibit B—what does the skeletal position in the left hip demonstrate to you?

* * *

* * * [61] may not have suffered?

A. That is right.

Q. You don't know whether there has been a diminution in pain postoperatively compared to the preoperative condition?

A. That is right.

Q. So all you can say is it looks like the bones are where they ought to be?

A. That is right. And in my experience this should be expected to decrease the disability in his hip.

Q. This is the very purpose of the operation, isn't it?

A. That is right.

(Thereupon a short recess was taken).

Q. Doctor, assuming that a surgeon is doing a Pemberton Procedure on an adult and achieves a visually good bone position but does run a screw into the head of the femur, would that in your opinion constitute negligence?

MR. HARRISON: I object to that question on the basis it calls for a legal conclusion from the witness which he is not capable of giving due to any experience he may have. And I instruct that he not answer.

MR. MILHOLLAND: What? How can you instruct him to not answer? You don't represnt him.

MR. HARRISON: If you want him to answer, make him answer, but I am instructing him not to answer. How can he be presumed to be able to answer a question on negligence?

ITEM 5/APPENDIX B

IN THE MISSOURI COURT OF APPEALS
KANSAS CITY DISTRICT

KCD 29573

STATE OF MISSOURI, ex rel. Lawrence Sperandio,
Relator,

vs.

THE HONORABLE LEWIS W. CLYMER,
Respondent.

SUGGESTIONS IN OPPOSITION TO PETITION FOR ALTERNATIVE WRIT OF MANDAMUS

(Filed June 15, 1977)

Comes now respondent, and, in opposition to the petition for writ of mandamus suggests the following to the Court:

I

INTRODUCTION

The undersigned attorneys appeared below on behalf of defendant Paul A. Pemberton for the special purpose of filing a Motion to Quash Process and Return of Process and To Discharge Pemberton. These Suggestions In Opposition to the Petition for Alternative Writ of Mandamus are filed on behalf of the respondent, The Honorable Lewis W. Clymer, for the special purpose of opposing the petition and do not constitute a general appearance on behalf of Paul A. Pemberton.

* * *

III

ARGUMENT

1. Respondent suggests that this Court should deny the relief requested by Relator for the reason that Relator is guilty of laches. The facts disclose that the ruling of which Relator complains was made on March 7, 1975. Now, more than two (2) years subsequent to said ruling Relator makes his first attempt to contest the ruling. No excuse or reason is offered by Relator for his delay in making complaint of the ruling of the Court.

Laches is a doctrine which applies to proceedings in mandamus. *State ex rel. Schultz* vs. *Fogerty*, 195 S.W.2d 908 (Mo. App. 1946) and *State ex rel. Lowey* vs. *Yates*, 251 S.W.2d 834 (Mo. App. 1952). In both of those cases, the Court refused to extend relief to the relator because of laches. In *Fogerty*, the Court criticized the relator for waiting *nearly* two years before filing his petition for writ of mandamus. In the instant case, Relator has waited for *more* than two years before filing his petition.

It is not the mere delay which constitutes laches in this case. It is the neglect for an unreasonable and unexplained length of time which has resulted in disadvantage and prejudice of Pemberton that makes Relator guilty of laches. *Missouri Federation of the Blind* vs. *National Federation of the Blind of Missouri, Inc.*, 505 S.W.2d 1 (Mo. App. 1974). Here, Pemberton relied on a ruling of the Court which quashed the summons for lack of jurisdiction. For more than two years Pemberton has justifiably believed that he was not a party defendant to the malpractice action brought by Relator. There is no fact in the record which indicates that such reliance was misplaced. During those two years, during which Pemberton believed that he was no longer a party to the

action, there has been no effort to prepare a defense for him. There have been no consultations between Pemberton and his attorneys. There has been no effort made at gathering evidence or talking to witnesses. There has been no discovery on the part of Pemberton. There has been no attempt to review the facts of the case in preparation for litigation. Indeed, the passage of time always clouds the memory and robs persons of the ability to recall specific facts of a given case. Obviously, every piece of litigation involves some delay. But here, Pemberton had no opportunity to review facts before they became stale or to discuss the case to keep it fresh in his mind. All of this caused prejudice and disadvantage to Pemberton and yet there is no fault on his part associated with the delay. It is due solely to the unreasonable and unexcused neglect of Relator to do what in law should have been done. *Missouri Federation of the Blind* vs. *National Federation of the Blind of Missouri, Inc.*, 505 S.W.2d at 8.

Because of these facts, Relator is guilty of laches and the relief requested should be denied.

2. The facts pled by relator indicate that defendant Pemberton was not a resident of Missouri, has not practiced medicine in Missouri, had no "direct contact" with the Relator and that Pemberton did not commit any tortious act within this state. Relator's argument is based upon the fact that the plaintiff suffered alleged damage in Missouri and therefore Pemberton is subject to long-arm jurisdiction under section 506.500 R.S.Mo. 1969.

Under the facts of the case, Pemberton is not subject to Missouri's long-arm jurisdiction statute and the ruling of the Circuit Court is correct.

Relator's argument is premised on the mere *conclusion* that Pemberton committed a tort against Sperandio. Yet, the petition is devoid of any factual basis to support such a conclusion. There is no showing of any duty owed to Sperandio by Pemberton and no showing of a breach of such duty. Without establishing both a duty existing on the part of Pemberton and a breach thereof, there can be no tort action. *Nichols* vs. *Blake*, 418 S.W.2d 188, 191 (Mo. App. 1967). The facts as stated by Relator indicate that there was no contact between Sperandio and Pemberton; there was no control by Pemberton over the acts of others involved; there was no payment to Pemberton by any person involved; there was no doctor-patient relationships between Pemberton and Sperandio; and there was no knowledge by Pemberton as to whether the procedure would or would not be employed by others. Thus, Relator has failed to establish a factual basis for the conclusion that Pemberton was guilty of any tortious conduct because there is no showing of a duty or a breach thereof. Without a breach of some such duty there was no basis for jurisdiction under section 506.500.

The cases cited by the Relator are all distinguishable. In *Fulton* vs. *Chicago, Rock Island & Pacific Railroad Company*, 481 F2d 326 (8th Cir. 1973) the alleged tortfeasor was a railroad which contracted with the plaintiff to ship certain equipment to Missouri from Minnesota. Employees of the Soo Line Railroad acted either as inspectors or as supervisors of the loading of the equipment onto the rail cars. An accident then occurred in Missouri and the Court held that the negligence of Soo was a tort committed in Missouri and subjected the railroad to jurisdiction in Missouri. In so holding the Court noted that from a "qualitative" view there was a relevant connection with Missouri because Soo was the initiating carrier

and knew the cargo would enter Missouri and the damage to plaintiff occurred because of the negligence of Soo. See 481 F2d at 335. These facts are so distinguishable from the present case that *Fulton* just does not apply.

Relator also cites *State ex rel. Birdsboro Corp.* vs. *Kimberlin*, 461 S.W.2d 292 (Mo. App. 1970) and *State ex rel. Apco Oil Corp.* vs. *Turpin*, 490 S.W.2d 400 (Mo. App. 1973). These cases also are distinguishable from the instant case. Both *Birdsboro* and *Apco* involved an out of state manufacturer who produced a product for sale and use in Missouri. Both cases relied on *Gray* vs. *American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 for the proposition that if a corporation elects to sell its products for ultimate use in another state, the corporation should be answerable in the forum where its defective product caused the damage. Implicit in that holding is the idea that a corporation cannot insulate itself from liability for damages caused by defective products it knowingly introduces into commerce for sale and use in other jurisdictions. To so allow a manufacturer to erect a barrier of jurisdiction would violate a public policy of permitting an injured party to attempt recovery against the ultimate wrong-doer.

Birdsboro, Apco and *American Radiator* just do not apply to the factual circumstance before this Court. It is admitted that Pemberton did not receive payment for the suggestions he gave. He did not seek profit and then attempt to hide from liability as in the three cases mentioned above. Nor is there any fact which indicates that Pemberton knew that his suggestions would be followed in this state. It is respectfully submitted that there is a great difference between a foreign manufacture who sells products in Missouri for use here and the instant case wherein a physician gratuitously answered an inquiry

from a colleague as to a medical procedure involving the colleague's patient. It certainly was not the decision of Pemberton to utilize the procedure. The facts set forth by Relator does not establish that Pemberton knew the procedure was used until he was deposed.

Respondent is unaware of any reported case of a Missouri Court where an individual, residing in another state, who has not committed a tort in Missouri, has been subjected to jurisdiction in Missouri under section 506.500. A recent case on point is *State ex rel. Bank of Gering* vs. *Schoenlaub*, 540 S.W.2d 31 (Mo. Banc 1976). In that case the plaintiff sent drafts to a Nebraska bank for negotiation. The bank held the drafts and did not notify plaintiff that the drafts would not be honored. The plaintiff alleged damage as a result of the failure to be notified. The bank filed a motion to quash the summons and said motion was overruled. A writ of prohibition was then sought by the bank. The Supreme Court reviewed the major cases dealing with jurisdiction and concluded that the bank committed no tort in Missouri because of all its acts occurred in Nebraska. The only "act" of the bank which occurred in Missouri was the use of the mail in returning the draft or proceeds to plaintiff's bank. The Court expressly held that use of the mail was not sufficient to subject the bank to jurisdiction in Missouri because the facts did not prove the required "minimum contacts" with Missouri to meet the constitutional due process requirements.

It is submitted that Gering is on point and controls the instant case. Relator admits that Pemberton did not do business in Missouri and that the alleged negligence by Pemberton took place outside of Missouri. The only argument of Relator for asserting jurisdiction over Pemberton was the use of the mail to answer the inquiry of

plaintiff's physicians. Under *Gering* such use of the mails does not establish the factual basis necessary to find that the "minimum contacts" exist. Without such minimum contacts it would be unconstitutional to subject Pemberton to jurisdiction in Missouri. *International Shoe Company* vs. *Washington*, 326 US 310, 66 S.Ct. 154, 90 L.Ed. 95. Therefore, the ruling of the Circuit Court was correct in all respects.

Respectfully submitted,

McKenzie, Williams, Merrick, Beamer & Wells

By /s/ Jack G. Beamer
Jack G. Beamer

By /s/ Jerry M. Drewry
Jerry M. Drewry

2100 Bryant Building
1102 Grand Avenue
Kansas City, Missouri 64105
842-0850

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Suggestions were served on the following by depositing a copy in the United States mail, postage prepaid, this 15th day of June, 1977:

Mr. John C. Milholland
302 East Pearl
Harrisonville, Missouri 64701

Mr. E. J. Murphy
Seven North Main
Butler, Missouri 64730

Mr. Roy F. Carter
2420 Pershing - Suite 400
Kansas City, Missouri 64108

Honorable Lewis W. Clymer
Circuit Court of Jackson County
Division #8
Sixth Floor
Jackson County Courthouse
Kansas City, Missouri 64106

By /s/ Jerry M. Drewry

ITEM 6/APPENDIX B

MISSOURI COURT OF APPEALS
KANSAS CITY DISTRICT

No. KCD 29573

STATE OF MISSOURI, ex rel.
LAWRENCE SPERANDIO,
Relator,

vs.

The Honorable LEWIS W. CLYMER, Judge of the 16th Judicial Circuit, Jackson County Circuit Court, Division No. 8,
Respondent.

ORDER

There being presented relator's Motion for an Order Amending Alternative Writ of Mandamus and the court being now fully advised in the premises, it is

ORDERED that said motion be and it is hereby overruled.

Dated at Kansas City, Missouri, this 5th day of July, 1977.

/s/ Solbert M. Wasserstrom
Acting Chief Judge

Swofford, J., not participating.
Shangler and Dixon, JJ., absent.

ITEM 7/APPENDIX B

IN THE
CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

CV75-0031

CIVIL "C"

LAWRENCE SPERANDIO,
Plaintiff,

vs.

HARVEY R. MICHAEL, et al.,
Defendants.

MOTION TO DISMISS

Comes now defendant Paul Pemberton, appearing specially for purposes of this Motion and for no other reason, and moves the Court to dismiss the said defendant from the case and states the following to the Court:

1. Defendant Pemberton was discharged from this lawsuit by the Circuit Court of Jackson County, Missouri on the 7th day of March 1975, because the Court lacked jurisdiction. A copy of the order discharging defendant is attached hereto as Exhibit "A". Said order has never been appealed and is final.

2. Plaintiff sought a Writ of Mandamus from the Missouri Court of Appeals and said relief was denied by the Court of Appeals. The order of the Court of Appeals is now final. Copies of plaintiffs applications for the writ and suggestions in support thereof, copies of defendants suggestions in opposition and the order of the Court of Appeals are attached hereto as Exhibits "B", "C" and "D", respectively.

3. Plaintiff has again caused the petition and summons to be served on defendant Pemberton. Said service was achieved on the 3rd day of August, 1977. The petition so served is the same petition as had been previously served on defendant. There is absolutely nothing before the Court to indicate that any fact has changed and no facts have changed since the order of the Circuit Court which discharged defendant. Plaintiff has not alleged that any facts have changed since that order.

4. Therefore, plaintiff is estopped from maintaining the cause of action against defendant Pemberton in the state of Missouri. Since the previous rulings established that there is no jurisdiction over Pemberton, the doctrine of res judicata operates to prevent plaintiff from proceeding further against defendant Pemberton.

5. Defendant's Suggestions in Support are attached hereto and incorporated by reference as if fully set out herein.

WHEREFORE, defendant Pemberton moves the Court for an order dismissing him from the case with prejudice.

McKenzie, Williams, Merrick, Beamer & Wells

By /s/ Jack Beamer
Jack G. Beamer

By /s/ Jerry M. Drewry
Jerry M. Drewry

2100 Bryant Building
1102 Grand Avenue
Kansas City, Missouri 64106
816-842-0850

Attorneys for Defendant Pemberton

CERTIFICATE OF SERVICE

Copy of Motion to Dismiss and Suggestions in Support mailed this 18th day of August 1977 to: MR. E. J. MURPHY, Seven North Main, Butler, Missouri and MR. JOHN C. MILHOLLAND, 302 East Pearl, Harrisonville, Missouri, attorneys for plaintiff, MR. ROY F. LARSON, Suite 400 Two Crown Center, 2420 Pershing Road, Kansas City, Missouri 64108, attorney for defendant Oversch.

/s/ Jerry M. Drewry

ITEM 8/APPENDIX B

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
Jefferson City, Missouri
65101

Thomas F. Simon
Clerk

Telephone
(314) 751-4144

November 14, 1977

Mr. John C. Milholland
302 East Pearl
Harrisonville, Missouri 64701

In re: State ex rel. Lawrence Sperandio vs. Hon. Lewis W. Clymer, Judge, No. 60411

Dear Mr. Milholland:

This is to advise that the Court this day entered the following order in the above-entitled cause:

"Relator's petition for writ of mandamus sustained and alternative writ to issue returnable within 15 days."

A copy of the alternative writ is enclosed herewith.

Yours very truly,

Thomas F. Simon
/s/ Mary Elizabeth McHaney
Mary Elizabeth McHaney
Deputy Clerk, Court en Banc

cc: McKenzie, Williams, Merrick,
Beamer and Wells

IN THE SUPREME COURT OF MISSOURI
EN BANC

SEPTEMBER SESSION, 1977

No. 60411

State ex rel. Lawrence Sperandio,
Relator,

vs.

Hon. Lewis W. Clymer, Judge, 16th Judicial Circuit,
Respondent.

MANDAMUS

GREETING:

WHEREAS, it has been represented to the Supreme Court of Missouri on the part of Lawrence Sperandio. the relator, as indicated and set forth in a certain petition for writ of mandamus, a copy of which, together with exhibits, is attached hereto and made a part hereof:

NOW, THEREFORE, We being willing that justice be done on behalf of the relator named above, do COMMAND you, the said Lewis W. Clymer, Judge of the Circuit of Jackson County, to set aside your order of dismissal made on September 19, 1977 and to proceed to exercise jurisdiction over the person of defendant Paul A. Pemberton, M.D., in cause No. CV75-0031 entitled Lawrence Sperandio, vs. Harvey R. Michael, M.D., et al., or that you show cause, if any you have, before the Supreme Court of Missouri, en Banc, on or before November 29, 1977, why you should not do so.

Herein fail not at your peril.

IN TESTIMONY WHEREOF, I have hereunto set my hand and the Seal of said Court at my office in the City of Jefferson, this 14th day of November, 1977.

/s/ Thomas F. Simon
Clerk, Supreme Court of Missouri

ITEM 1/APPENDIX C

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
Jefferson City, Missouri
65101

Thomas F. Simon
Clerk

Telephone
(314) 751-4144

MAIL
P. O. BOX 150

April 28, 1978

Mr. John C. Milholland
302 East Pearl
Harrisonville, Missouri 64701

In re: State ex rel. Lawrence Sperandio vs. Hon. Lewis W. Clymer, Judge, 16th Judicial Circuit-No. 60411

Dear Mr. Milholland:

This is to advise that the Court this day has made the following order in the above-entitled cause:

"Respondent's motion for rehearing overruled. Finch and Henley, JJ., not participating."

Yours very truly,

/s/ Thomas F. Simon
Clerk.

cc: McKenzie, Williams, Merrick, Beamer & Wells

ITEM 2/APPENDIX C

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
Jefferson City, Missouri
65101

Thomas F. Simon
Clerk

Telephone
(314) 751-4144

MAIL
P. O. BOX 150

May 23, 1978

Mr. Jack G. Beamer
Mr. Phillip S. Smith
2100 Bryant Building
Kansas City, Missouri 64106

In re: State ex rel. Lawrence Sperandio vs. Hon. Lewis W. Clymer, Judge—No. 60411

Gentlemen:

This is to advise that the Court this day has made the following order in the above-entitled cause:

"Respondent's motion for stay of proceedings sustained pending disposition by the U.S. Supreme Court of application for writ of certiorari, if same is timely filed."

Yours very truly,

/s/ Thomas F. Simon
Clerk.

cc: Mr. John C. Milholland

Supreme Court, U. S.
FILED
JUL 25 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-44

PAUL A. PEMBERTON,
Petitioner,

vs.

LAWRENCE SPERANDIO,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE ISSUANCE OF A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

JOHN C. MILHOLLAND
Box A 302 East Pearl
Harrisonville, Missouri 64701
Telephone 816 884-3218
Attorney for Respondent

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

INDEX

QUESTION PRESENTED 1

ARGUMENT—

I Certiorari should be denied under Supreme Court Rule 23(4) because of the material inaccuracy of the petition for certiorari in minimizing petitioner's contacts with the State of Missouri 2

II Petitioner treats the practice of medicine and surgery as an unregulated business in Missouri. It is not. The State of Missouri has expressed its interest in the practice of medicine and surgery and regulates those who may so practice. The cases declaring the elements of minimum contacts in unregulated transactions which are relied upon by petitioner are not persuasive. Petioner has failed to show that the opinion of the Supreme Court of Missouri is contrary to any decision of this Court or to any probable decision of this Court in the future. Certiorari should be denied 9

III Missouri's jurisdiction over the person of petitioner must stand as absolute because of petitioner's voluntary general appearance in the case by his plea for a dismissal of the petition with prejudice. A plea for affirmative relief is a general appearance and waives any defect in personal jurisdiction. Certiorari should be denied 11

CONCLUSION 14

Table of Authorities

Cases

Greenwood v. *Schnake*, 396 S.W.2d 723 (Mo. 1965) 13

McGee v. *International Life Insurance Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957) 9

State ex rel. Dennis v. *Snodgrass*, 501 S.W.2d 553 (Mo. App. 1973) 13

State ex rel. Sperandio v. *Clymer*, 563 S.W.2d 88 (Mo. App. 1978) 7

Statutes

Chapter 334, RSMo. 10

Rules

Rule 23(4), Supreme Court Rules 2, 3, 14

Rule 12, Federal Rules of Civil Procedure 13, 14

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-44

PAUL A. PEMBERTON,
Petitioner,

vs.

LAWRENCE SPERANDIO,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE ISSUANCE OF A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

QUESTION PRESENTED

This is respondent's brief in opposition to the grant of a writ of certiorari upon the asserted ground of petitioner's lack of minimum contacts with the State of Missouri and, as grounds which should preclude the grant of certiorari, urges the affirmative answers to these subquestions:

Should certiorari be denied because:

a. Petitioner has inaccurately failed to disclose in his petition the full extent of his contacts with the State of Missouri, and

b. Because the protection of its citizens in matters of surgical treatment is a matter of state concern upon

which the Legislature of the State of Missouri has enacted governing legislation and the prescription for surgery upon the person of respondent to be performed within Missouri rendered petitioner subject to the jurisdiction of Missouri courts, and

c. Because, in spite of any claimed lack of minimum contacts, petitioner entered a general appearance in the state trial court by invoking the jurisdiction of the trial court to grant affirmative relief to petitioner and thereby effectively waived any claim of lack of personal jurisdiction?

ARGUMENT

I.

Certiorari should be denied under Supreme Court Rule 23(4) because of the material inaccuracy of the petition for certiorari in minimizing petitioner's contacts with the State of Missouri.

Petitioner, Paul A. Pemberton, is sued in two counts for medical malpractice and for active and overt participation in the execution of a conspiracy to fraudulently conceal the result of the malpractice from respondent.

His petition should be denied for its inaccuracy.

Petitioner comes to this Court and, by omission and inaccurate implication, disregards the factual allegations of his participation in a conspiracy whose overt execution and resulting damage occurred in the State of Missouri and thereby suggests that he is charged only with the first count malpractice and only as a result of a mere letter of medical information mailed into the State of Missouri from the State of Utah.

By such omission to recite or consider the facts indicating culpability in the pleaded conspiracy of fraudulent concealment, petitioner falls short of complete candor in his recital of the facts concerning his contacts with the State of Missouri.

The petition for certiorari is based upon your Utah-resident petitioner's sole contention that he did not have sufficient contacts with the State of Missouri to permit Missouri to exercise jurisdiction over his person. Therefore, any proposed review by certiorari necessarily requires an evaluation of the facts relating to petitioner's conduct to determine the narrow factual question of minimum contacts, vel non.

It is paramount that your petitioner shall have been accurate in his factual statement of the case since the resolution of his question tendered for review depends upon weighing the facts.

Supreme Court Rule 23(4) states that inaccuracy will be a sufficient reason for denying the petition:

> "4. The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

This petition for certiorari does not bring with it the usual record of a trial below. There has not been a trial. Thus, of necessity, your litigants and this Court must look to the facts pleaded in the petition below and the facts averred in exhibit affidavits appended.

Respondent's two-count petition was dismissed by the trial judge as to petitioner. It was dismissed with prejudice to its refiling against petitioner (A 10). It was ordered

reinstated by the opinion of the Supreme Court of Missouri which recognized the existence and effect of the petition's two counts (A 1):

> "Relator Sperandio charges . . . Paul A. Pemberton . . . and others with medical malpractice *and other tortious conduct.*" Emphasis supplied.

Unaccountably, the petition for certiorari makes no reference to the "other tortious conduct" and, furthermore, its Appendix includes Count I (A 18-25) but omits Count II of the petition so that this Court is left to speculate about the "other tortious conduct." It would seem obvious that the facts of the "other tortious conduct" charged are "essential to a ready and adequate understanding of the points requiring consideration." Surprisingly, however, the reason for petitioner's intentional omission of Count II from the Appendix is stated by petitioner to be (A 15):

"COUNT II

> "(Omitted as not being relevant to the issues raised in this proceeding.),"

and petitioner completely ignores the substance of Count II in his petition for certiorari.

Count II is the basis for the observation of the Supreme Court of Missouri that your petitioner is charged with "other tortious conduct." (A 1). We suggest that its facts are, indeed, relevant.

One of the other defendants (jointly charged with your petitioner with "other tortious conduct" by Count II of the petition below) was also successful in persuading the same trial judge to dismiss the petition as to him. That action of dismissal, also, was countermanded by a final judgment in another original proceeding brought

against the trial judge in the Missouri Court of Appeals. Reference to that collateral proceeding is made by petitioner in the section of his petition for certiorari entitled "Opinions Below" wherein it is referenced as, "The opinion of the Missouri Court of Appeals, Kansas City District, dated June 23, 1977 is not reported and is included as Appendix A, page A6."

The document at page 6 of the Appendix is not the opinion of the Missouri Court of Appeals. It is an alternative writ of mandamus.

The *opinion* of the Missouri Court of Appeals *is* reported. It is a final judgment. It was filed February 6, 1978, rehearing was denied February 27, 1978 and application for transfer to the Supreme Court of Missouri was denied April 10, 1978. It is officially reported at 563 S.W.2d 88 (Mo.App. 1978) and is styled *State ex rel. Sperandio* v. *Clymer*. That final judgment of the Missouri Court of Appeals constitutes the law of the case insofar as it judicially construes Count II of respondent's petition now pending below.

That final judgment judicially declares the validity of the "other tortious conduct" claim pleaded against the defendants to Count II (including your petitioner).

If petitioner were to be accurate in his petition for certiorari, his Questions Presented would be recast to present the question as:

> Where a Utah-resident physician invented a novel and specialized surgical procedure to cut and move part of a shallow hip socket in a child to a proper position over the head of the thigh bone, taking advantage of the plasticity of the cartilage extant between the hip bones in children which does not exist in adults, and

Where he designed a modification of the technique for use in adults which depended upon a controlled fracture to compensate for the lack of the plasticity found in children, and

Where two Missouri-resident surgeons who knew nothing of how to do his surgical procedure sought his consultation by mail for the purposes of 1) his confirming their diagnosis of their Missouri-resident, adult patient's condition and 2) his recommending surgical treatment and 3) his instructing them in its execution which they intended to accomplish within the State of Missouri upon their specific patient, and

Where in response and agreement he undertook to and did diagnose, prescribe, design and illustrate by drawing directly upon the Missouri patient's x-rays the unique surgical operation to be performed within Missouri upon the Missouri patient and mailed those instructions and designs into Missouri for intended use within Missouri, and

Where the directions for surgery unsuccessfully were attempted to be executed within Missouri and resulted in disability of the patient which was followed with a suit by the patient against the two Missouri-resident surgeons, and

Where the Missouri-resident surgeons had represented falsely to their patient that the surgery had placed his hip bones in proper position, and

Where the Utah-resident doctor was not a party to the Missouri litigation but, nevertheless, voluntarily and at the request of the Missouri-resident surgeons participated in its defense by giving his deposition in Utah for the transmission to and for use within

Missouri to influence the determination of the patient's claim adversely and against the patient in the Missouri court and testified falsely in support of the concealments made by the Missouri-resident surgeons that the bones had been successfully placed in proper position while in fact the bones had not been placed in proper position by the surgery,

Does such participation in medical malpractice within Missouri by instruction and such voluntary participation in a conspiracy with Missouri-residents to fraudulently conceal from the patient in Missouri the nature and extent of the damage done the patient in Missouri constitute sufficient contacts with the State of Missouri to subject petitioner to jurisdiction of the Missouri court?

Unfortunately, the question recast in that form cannot be fairly examined here because of the petitioner's intentional omission of all consideration or discussion of Count II and the final judgment relating to Count II in *State ex rel. Sperandio* v. *Clymer,* which is reported officially at 563 S.W.2d 88 (Mo.App. 1978).

If the petition for certiorari were accurate and considered the factual allegations of petitioner's joinder in a conspiracy to commit fraud which was executed within Missouri with resulting damage, it would be clear that petitioner *participated in the commission* of a tort committed within Missouri. See: *State ex rel. Sperandio* v. *Clymer,* 563 S.W.2d 88, 90-91 (Mo.App. 1978):

> "As to the Count II claim asserted against Snead, it is further alleged that he, knowing that surgical intervention in Sperandio's hip joint would lay open to direct visual inspection the malpositioned fragments of his acetabulum, and reveal the extent of the damage which had occurred to his hip on the December 2,

1967, surgery, Snead joined in the conspiracy to conceal from Sperandio the condition of his hip and to prevent him from promptly receiving further remedial care which would reveal the true condition."

* * *

"[2] What is here alleged is that Snead joined a preexisting fraudulent purpose of knowingly concealing Sperandio's true condition from him, and knowing that planned surgery at UMMC would reveal the previous malpractice and its concealment, taking steps to prevent that surgery by affirmatively, overtly writing the letter of December 8, 1968, warning that Sperandio had litigation in mind, all to Sperandio's damage, as alleged. The allegations are for a conspiratorial, intentional tort sounding in fraud, although that fraud was originally practiced by Michael and Yancey, as alleged. It is said in 15A C.J.S. Conspiracy § 19, p. 659, 'To render a person civilly liable for injuries resulting from a conspiracy of which he was a member, it is not necessary that he should have joined the conspiracy at the time of its inception; every one who enters into such a common design is in law a party to every act previously or subsequently done by any of the others in pursuance of it, * * *.' See also 16 Am.Jur.2d, Conspiracy, § 48, p. 151."

In apparent justification of his disregard of Count II and its judicial construction, petitioner argues that his own exculpatory conclusions contained in his affidavit constitute the adjudicated facts and show that he was not a part of the fraudulent conspiracy of concealment (A 32):

"I did not at any time from September 14, 1967 to Feb., 1974 consult with or advise either Mr. Sperandio or Harvey R. Michael, M.D., Daniel L. Yancey, M.D., William H. Snead, M.D., D. E. Caywood or David A. Fardon, M.D. concerning Mr. Sperandio; the two letters, Exhibits B and C, constitute my sole contact."

In direct disputation appears the affidavit of counsel for Mr. Sperandio who attended the voluntary deposition given by petitioner on behalf of both Harvey R. Michael and Daniel L. Yancey on March 16, 1972, which is a date within the time (September 14, 1967 to Feb., 1974) during which petitioner averred that he did not advise Sperandio or Michael or Yancey of anything (A 39). Furthermore, excerpts from petitioner's deposition show clearly that he stated under oath that the surgery resulted in Sperandio's hip bones being "where they ought to be." (A 43).

For the failure of petitioner to accurately apprise this Court of the whole extent of his contacts with the State of Missouri, certiorari should be denied.

II.

Petitioner treats the practice of medicine and surgery as an unregulated business in Missouri. It is not. The State of Missouri has expressed its interest in the practice of medicine and surgery and regulates those who may so practice. The cases declaring the elements of minimum contacts in unregulated transactions which are relied upon by petitioner are not persuasive. Petitioner has failed to show that the opinion of the Supreme Court of Missouri is contrary to any decision of this Court or to any probable decision of this Court in the future. Certiorari should be denied.

Petitioner recognizes the authority of *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957) which in turn recognizes the efficacy of a state's legislated supervision of insurance contracts

within the State of California. A single, mailed insurance contact subjected the insurance company to the jurisdiction of the California courts.

But, petitioner fails to note or to point to the fact that Missouri similarly has legislated control of the practice of medicine and surgery in Missouri. Chapter 334, RSMo.

There is no doubt that if petitioner had stood in the Missouri surgical theater and given oral directions to the two Missouri-resident surgeons as he actually gave his written directions by mail from Utah, that the State of Missouri would have had an interest in his actions. Petitioner fails to distinguish the effect of his written directions for the mechanics of surgery to be performed upon a specific Missouri resident within Missouri from in-the-state oral directions which might have been given to the same effect.

Petitioner also suggests that he is insulated from responsibility because of a lack of privity with respondent. If that were so, then no consulting physician who might be solicited by a patient's treating physician for specific evaluation and advice would ever be accountable to a patient for medical negligence in consultation. Petitioner's suggestion is not supported by authority and is not valid.

Petitioner would equate his written directions and sketched plan for specific surgery to be performed upon a specific patient, prescribed and intended to correct a specific diagnosed condition within the State of Missouri with general advice which is commonly disseminated by medical treatises. His argument is not tenable. He did not write or sketch to a general principle; he diagnosed a specific patient's condition and recommended a specific, unique surgical procedure which he designed and platted for that specific patient for known execution within the State of Missouri (A 42): "A. That is the site of the

osteotomy which I recommended be made to release the Acetabulum."

Petitioner lays great emphasis upon the fact that respondent has not shown any agreement that petitioner should be compensated for his diagnostic and prescriptive services. For that reason, petitioner argues that he is immune to accountability for his negligence and torts. If that were so, any physician who donates services to a free clinic would be held immune from the consequences of his negligence in treating charity patients. There is no such law and petitioner points to none such.

Petitioner initially had no duty to assist the Missouri surgeons who were ignorant of his Pemberton Procedure. But, having undertaken to assist, having undertaken to assume the duty, he is accountable for his undertaking.

Missouri has a state interest in the surgery performed within Missouri and petitioner fails to demonstrate that he may direct surgery being performed within Missouri from without Missouri and yet remain immune to the jurisdiction of Missouri courts in adjusting the results of such surgery.

Certiorari should be denied.

III.

Missouri's jurisdiction over the person of petitioner must stand as absolute because of petitioner's voluntary general appearance in the case by his plea for a dismissal of the petition with prejudice. A plea for affirmative relief is a general appearance and waives any defect in personal jurisdiction. Certiorari should be denied.

By order entered March 7, 1975, original service of process upon petitioner Pemberton was quashed and he

stood beyond the pale of the Missouri trial court just as though he had not been served at all (A 9).

Thereafter, petitioner was served with alias summons on August 3, 1977 (A 2). His petition for certiorari speaks to the proceedings subsequent to the summons served upon him on August 3, 1977 which the Supreme Court of Missouri has held to be a valid service (A 1-5).

Although the Supreme Court of Missouri has held that Pemberton's contacts with the State of Missouri satisfy the federal requirements of minimum contacts (A 1-5), jurisdiction over Pemberton also must be sustained for the additional reason of his voluntary application to the Missouri trial court for affirmative relief, a voluntary submission of his person to the jurisdiction.

His Motion to Dismiss which he filed subsequent to the August 3, 1977 service carried the incantation of "special" appearance but he sought a dismissal *with prejudice* (A 53-54):

> "WHEREFORE, defendant Pemberton moves the Court for an order dismissing him from the case with prejudice."

Acting upon that motion, the trial court did grant affirmative relief by dismissing the case *with prejudice to its refiling* against Pemberton (A 10). It was a case-ending order of dismissal as to Pemberton, affirmatively sought and gained by Pemberton.

It is held under the procedural law of Missouri that a mere recital of "special appearance" is a meaningless vestigial remnant of ancient pleading practice in Missouri and that under post-1943 pleading practice, the *relief sought* governs the substance of the appearance. "Special

appearance" is called "ancient abracadaba" (sic). *State ex rel. Dennis* v. *Snodgrass*, 501 S.W.2d 553, 558 (Mo.App. 1973).

The mere fact that a non-resident by reason of lack of minimum contacts may be immune to service of process which requires him to appear and defend does not mean that he may not appear and defend *of his own choice.*

Pemberton sought *only* to have the case dismissed as to him. He did not seek to have the summons of August 3, 1977 quashed. He need not have stood upon the claimed lack of personal jurisdiction and he did not. He was free to waive it and he did. For the Missouri law on this point we cite *Greenwood* v. *Schnake*, 396 S.W.2d 723, 726 (Mo. 1965):

> "[1-3] Note well, however, that a defendant objecting to lack of jurisdiction over his person should *promptly* file the motion raising the question. Such a motion must be made within the time allowed for responding to the opposing party's pleading, Civil Rule 55.36; § 509.330, and if not made within the time therein limited the party waives all objections to jurisdiction then available to him, by the express provisions of Civil Rule 55.37 and § 509.340." Emphasis the court's.

It is clear that if the trial court did not have jurisdiction over the person of petitioner, it did not have jurisdiction to dispose of respondent's claim against petitioner finally by a dismissal with prejudice, the affirmative relief which the petitioner clearly sought (A 54) and the affirmative relief which the trial court just as clearly endeavored to grant (A 10).

If Federal Rule of Civil Procedure 12 is deemed to be controlling, still petitioner did not seek to have the

service of August 3, 1977 quashed; he sought *solely* the affirmative relief of a dismissal of the claim *with prejudice*, an affirmative claim-ending relief and thereby waived any objection to personal jurisdiction. Federal Rule 12(b), (g) and (h)(1).

Because petitioner Pemberton voluntarily *sought* and received the affirmative, case-ending relief of dismissal with prejudice rather than mere discharge for lack of personal jurisdiction, he waived any standing to complain of lack of personal jurisdiction and certiorari should be denied.

CONCLUSION

Certiorari should be denied under the terms of Supreme Court Rule 23(4) because petitioner did not state accurately the nature and extent of his contacts with the State of Missouri in his petition for certiorari. Certiorari should be denied because petitioner undertook to advise and counsel a specific surgery to be performed within the State of Missouri and brought himself within the scope of Missouri's state interest evidenced by regulatory legislation. Certiorari should be denied because the questions presented by the petition are moot; petitioner waived any standing to claim a lack of minimum contacts by voluntarily invoking the jurisdiction of the courts of Missouri in an attempt to secure a dismissal of respondent's claim with prejudice.

Respectfully submitted,

JOHN C. MILHOLLAND
Box A 302 East Pearl
Harrisonville, Missouri 64701
Telephone 816 884-3218
Attorney for Respondent